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TITLE 5

CRIMINAL OFFENSES

(CHAPTERS 1-49 IN VOLUME 3A)

SUBTITLE 5. OFFENSES AGAINST THE ADMINISTRATION OF GOVERNMENT

SUBTITLE 6. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, OR WELFARE

SUBTITLE 5. OFFENSES AGAINST THE ADMINISTRATION OF GOVERNMENT

CHAPTER 51

DISLOYAL CONDUCT

Subchapter 2 — Offenses Generally

5-51-201. Treason.

(a) Treason against the state shall consist only in:
(1) Levying war against the state; or
(2) Adhering to the state's enemies, giving them aid and comfort.
(b) No person shall be convicted of treason unless on:
(1) The testimony of two (2) witnesses to the same overt act; or
(2) The person's own confession in open court.
(c) Treason is punishable by death or life imprisonment without parole pursuant to §§ 5-4-601 — 5-4-605, 5-4-607, and 5-4-608.
(d) For all purposes other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-307, 5-4-401 — 5-4-404, 5-4-501 — 5-4-504, 5-4-601 — 5-4-605, 5-4-607, 5-4-608, 16-93-307, 16-93-313, and 16-93-314, treason is a Class A felony.

History. Rev. Stat., ch. 44, div. 2, art. 1, §§ 1, 2; C. & M. Dig., §§ 2321, 2322; Pope's Dig., §§ 2947, 2948; Acts 1975, No. 928, § 13; A.S.A. 1947, §§ 41-3951, 41-3952; Acts 2005, No. 1994, § 296; 2011, No. 570, § 31.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment, in (d), substituted "5-4-301 – 5-4-307" for "5-4-301 – 5-4-309, 5-4-311" and inserted "16-93-307, 16-93-313, and 16-93-314."

5-51-206. [Repealed.]

Publisher's Notes. This section, concerning advocating personal injury, destruction of property, or overthrow of government, was repealed by Acts 2013, No. 1348 § 5. This section was derived from Acts 1919, No. 512, § 2; C. & M. Dig., § 2319; Pope's Dig., § 2945; A.S.A. 1947, § 41-3954; Acts 2005, No. 1994, § 350.

5-51-207. [Repealed.]

Publisher's Notes. This section, concerning contempt for or desecration of the United States flag, was repealed by Acts 2013, No. 1348, § 6. The section was derived from Acts 1919, No. 64, §§ 1-3; C. & M. Dig., §§ 2315-2317; Pope's Dig., §§ 2941-2943; A.S.A. 1947, §§ 41-2971 — 41-2973; Acts 1989, No. 842, § 1; 1989 (3rd Ex. Sess.), No. 75, § 1.

5-51-208. Contempt for or desecration of the Arkansas flag.

RESEARCH REFERENCES

ALR. Validity, and Standing to Challenge Validity, of State Statute Prohibiting Flag Desecration and Misuse. 31 A.L.R.6th 333.

Subchapter 3 — Sabotage Prevention Act

5-51-305. [Repealed.]

Publisher's Notes. This section, concerning unlawful entry on property, was repealed by Acts 2013, No. 1348, § 7. The section was derived from Acts 1941, No. 312, § 7; A.S.A. 1947, § 41-3964; Acts 2005, No. 1994, § 409.

5-51-306. [Repealed.]

Publisher's Notes. This section, concerning questioning and detaining suspected persons, was repealed by Acts 2013, No. 1348, § 8. The section was derived from Acts 1941, No. 312, § 8; A.S.A. 1947, § 41-3965; Acts 2005, No. 1994, § 316.

5-51-308. [Repealed.]

Publisher's Notes. This section, concerning witnesses' privileges, was repealed by Acts 2013, No. 1348, § 9. The section was derived from Acts 1941, No. 312, § 6; A.S.A. 1947, § 41-3963.

5-51-309. [Repealed.]

Publisher's Notes. This section, concerning rights of labor not impaired, was repealed by Acts 2013, No. 1348, § 10. The section was derived from Acts 1941, No. 312, § 10; A.S.A. 1947, § 41-3967.

CHAPTER 53

OFFENSES RELATING TO JUDICIAL AND OTHER OFFICIAL PROCEEDINGS

Subchapter 1 — General Provisions

Effective Dates. Acts 2009, No. 331, § 3: Mar. 10, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that domestic violence is on the rise and poses a danger to the public; that increasing the penalty for repeat offenders aids both law enforcement and the victims of domestic violence and that this act is immediately necessary because current enforcement and prosecution will be greatly aided by the new, more serious penalties for those persons who repeatedly violate orders of protection. There-

fore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-53-101. Definitions.

As used in this subchapter:

(1)(A) "False material statement" means any false statement, regardless of its admissibility under the rules of evidence, which affects or could affect the course or outcome of an official proceeding or the action or decision of a public servant in the performance of any governmental function.

(B) Whether a false statement is material in a given factual situation is a question of law;

(2)(A) "Juror" means a member of any jury, including a grand jury and a petit jury.

(B) "Juror" also includes any person who has been drawn or summoned as a prospective juror;

(3)(A) "Oath" means swearing, affirming, and any other mode authorized by law of attesting to the truth of that which is stated.

(B) A written statement is treated as if made under oath if the written statement:

(i) Was made on or pursuant to a form bearing notice, authorized by law, to the effect that a false statement made pursuant to the form is punishable;

(ii) Recites that it was made under oath, and the declarant was aware of the recitation at the time he or she signed the written statement and intended that the written statement should be considered a sworn statement; or

(iii) Is made, used, or offered with the purpose that it be accepted as compliance with a statute, rule, or regulation which requires a statement under oath or other like form of attestation to the truth of the matter contained in the statement;

(4)(A) "Official proceeding" means a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, parole revocation judge, commissioner, notary, or other person taking testimony or depositions in any such proceeding.

(B) "Official proceeding" includes the signing or marking, under oath, of:

(i) A voter registration application;

(ii) An application for absentee ballot; or

(iii) A precinct voter registration list;

(5) "Testimony" includes an oral or written statement, document, or any other material that is or could be offered by a witness in an official proceeding;

(6) "Threat" means a menace, however communicated, to:

(A) Use physical force against any person; or

(B) Harm substantially any person with respect to his or her property, health, safety, business, calling, career, financial condition, reputation, or a personal relationship; and

(7)(A) "Witness" means:

(i) Any person for whose attendance to give testimony at an official proceeding any process has issued; or

(ii) Any person who is holding or plans to hold himself available to give testimony at an official proceeding.

(B) For the purpose of this code, a person is a "witness" if testimony is sought or offered by personal attendance at an official proceeding or by deposition or affidavit.

History. Acts 1975, No. 280, § 2601; A.S.A. 1947, § 41-2601; Acts 1995, No. 927, § 1; 1995, No. 938, § 1; 2003, No. 1185, § 5; 2013, No. 320, § 1.

Amendments. The 2013 amendment inserted "parole revocation judge" in (4)(A).

CASE NOTES

Analysis

Evidence.
Official Proceeding.

Evidence.

In a case in which defendant appealed his conviction for intimidating a witness, he unsuccessfully argued that the evidence was insufficient to support the conviction. The jury, acting as the fact-finder, weighed the evidence and determined that a letter from defendant to the witness contained a threat intended to influence the witness's testimony; the letter constituted substantial evidence to support the jury verdict. Cunningham v. State, 2010 Ark. App. 130, — S.W.3d — (2010).

Official Proceeding.

Defendant's first-degree murder conviction was overturned and the case was remanded for a new trial where a witness's prior inconsistent statement, which was taken by a detective, was not taken during an "official proceeding," as defined by § 5-53-101(4)(A), such that a false statement would be subject to the penalty of perjury, as the detective was not an official authorized to take the statement. Stephens v. State, 98 Ark. App. 196, 254 S.W.3d 1 (2007).

5-53-102. Perjury generally.

CASE NOTES

Official Proceeding.

Defendant's first-degree murder conviction was overturned and the case was remanded for a new trial where a witness's prior inconsistent statement, which was taken by a detective, was not taken during an "official proceeding" such that a false statement would be subject to the penalty of perjury, contrary to § 5-53-102(a), as the detective was not an official authorized to take the statement. Stephens v. State, 98 Ark. App. 196, 254 S.W.3d 1 (2007).

Substantial evidence supported defendant's conviction for perjury, under subsection (a) of this section, where given the contradictions between state trial testimony and the facts adduced at a federal

plea hearing, the jury could have reasonably inferred that defendant knowingly gave false material testimony under oath in an official proceeding. Stewart v. State, 2010 Ark. App. 323, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 370 (June 24, 2010).

5-53-108. Witness bribery.

CASE NOTES

Evidence.

Student's testimony that, prior to sexual assault charges being filed, defendant teacher approached him and told him to tell the victim, also a student, that the teacher would give the victim money if she would drop the case, was sufficient to support the teacher's conviction for witness bribery under subdivision (a)(1) of this section. Paschal v. State, 2012 Ark. 127, 388 S.W.3d 429 (2012), rehearing denied, — S.W.3d —, 2012 Ark. LEXIS 214 (Ark. May 3, 2012).

5-53-109. Intimidating a witness.

CASE NOTES

Evidence.

In a case in which defendant appealed his conviction for intimidating a witness, he unsuccessfully argued that the evidence was insufficient to support the conviction because there was no threat communicated since the witness testified that he did not feel threatened by the letter from defendant. This section did not require that the witness feel threatened; it simply required that a threat be communicated with the stated purpose. Cunningham v. State, 2010 Ark. App. 130, — S.W.3d — (2010).

In a case in which defendant appealed his conviction for intimidating a witness, he unsuccessfully argued that the evidence was insufficient to support the conviction. The jury, acting as the fact-finder, weighed the evidence and determined that a letter from defendant to the witness contained a threat intended to influence the witness's testimony; the letter constituted substantial evidence to support the jury verdict. Cunningham v. State, 2010 Ark. App. 130, — S.W.3d — (2010).

5-53-110. Tampering.

(a) A person commits the offense of tampering if, believing that an official proceeding or investigation is pending or about to be instituted, he or she induces or attempts to induce another person to:

(1) Testify or inform falsely;

(2) Withhold any unprivileged testimony, information, document, or thing regardless of the admissibility under the rules of evidence of the testimony, information, document, or thing and notwithstanding the relevance or probative value of the testimony, information, document, or thing to an investigation;

(3) Elude legal process summoning that person to testify or supply evidence, regardless of whether the legal process was lawfully issued; or

(4) Absent himself or herself from any proceeding or investigation to which that person has been summoned.

(b) Tampering is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2610; A.S.A. 1947, § 41-2610; Acts 2007, No. 827, § 45.

RESEARCH REFERENCES

ALR. Electronic spoliation of evidence. 3 A.L.R.6th 13.

5-53-111. Tampering with physical evidence.

RESEARCH REFERENCES

ALR. Electronic spoliation of evidence. 3 A.L.R.6th 13.

Ark. L. Rev. Comment, To the Spoliator Go the Spoils: Arkansas Rejects Spoliation of Evidence as a Tort Cause of Action, 61 Ark. L. Rev. 283.

CASE NOTES

Analysis

Applicability.
Evidence.

Applicability.

Trial court properly dismissed administratrix's tort claim for a third-party's alleged spoliation of the evidence in a wrongful death suit because a remedy had to be sought though a means other than an individual tort claim; criminal sanctions were still available under this section, even though a new tort was not recognized, and attorneys who were guilty of spoliation were still subject to discipline. Downen v. Redd, 367 Ark. 551, 242 S.W.3d 273 (2006).

Evidence.

Trial court did not err in convicting defendant of misdemeanor tampering with physical evidence because there was sufficient evidence to support the jury's verdict that defendant tampered with the physical evidence when he threw the drugs into the toilet to flush them with the purpose of impairing the availability of the drugs for use in prosecution, and the fact that defendant did not actually impair or obstruct the prosecution was why he was not convicted of a felony; by defendant's own admission, he was given the drugs to flush down the toilet when the police were seen approaching the house, and he took the drugs to the bathroom and threw them into the toilet but did not succeed in flushing them. Singleton v. State, 2011 Ark. App. 145, 381 S.W.3d 874 (2011).

5-53-134. Violation of an order of protection.

(a)(1) A person commits the offense of violation of an order of protection if:

(A) A circuit court or other court with competent jurisdiction has issued a temporary order of protection or an order of protection against the person pursuant to the The Domestic Abuse Act of 1991, § 9-15-101 et seq.;

(B) The person has received actual notice or notice pursuant to the Arkansas Rules of Civil Procedure of a temporary order of protection or an order of protection pursuant to the The Domestic Abuse Act of 1991, § 9-15-101 et seq.; and

(C) The person knowingly violates a condition of an order of protection issued pursuant to the The Domestic Abuse Act of 1991, § 9-15-101 et seq.

(2) A person commits the offense of violation of an out-of-state order of protection if:

(A) The court of another state, a federally recognized Indian tribe, or a territory with jurisdiction over the parties and matters has issued a temporary order of protection or an order of protection against the person pursuant to the laws or rules of the other state, federally recognized Indian tribe, or territory;

(B) The person has received actual notice or other lawful notice of a temporary order of protection or an order of protection pursuant to the laws or rules of the other state, the federally recognized Indian tribe, or the territory;

(C) The person knowingly violates a condition of an order of protection issued pursuant to the laws or rules of the other state, the federally recognized Indian tribe, or the territory; and

(D) The requirements of § 9-15-302 concerning the full faith and credit for an out-of-state order of protection have been met.

(b)(1) Except as provided in subdivision (b)(2) of this section, violation of an order of protection under this section is a Class A misdemeanor.

(2) Violation of an order of protection under this section is a Class D felony if:

(A) The offense is committed within five (5) years of a previous conviction for violation of an order of protection under this section;

(B) The order of protection was issued after a hearing of which the person received actual notice and at which the person had an opportunity to participate; and

(C) The facts constituting the violation on their own merit satisfy the elements of any felony offense or misdemeanor offense, not including an offense provided for in this section.

(c)(1) A law enforcement officer may arrest and take into custody without a warrant any person who the law enforcement officer has probable cause to believe:

(A) Is subject to an order of protection issued pursuant to the laws of this state; and

(B) Has violated the terms of the order of protection, even if the violation did not take place in the presence of the law enforcement officer.

(2) Under § 9-15-302, a law enforcement officer or law enforcement agency may arrest and take into custody without a warrant any person who the law enforcement officer or law enforcement agency has probable cause to believe:

(A) Is subject to an order of protection issued pursuant to the laws or rules of another state, a federally recognized Indian tribe, or a territory; and

(B) Has violated the terms of the out-of-state order of protection, even if the violation did not take place in the presence of the law enforcement officer.

(d) It is an affirmative defense to a prosecution under this section if:

(1) The parties have reconciled prior to the violation of the order of protection; or

(2) The petitioner for the order of protection:

(A) Invited the defendant to come to the petitioner's residence or place of employment listed in the order of protection; and

(B) Knew that the defendant's presence at the petitioner's residence or place of employment would be in violation of the order of protection.

(e) Any law enforcement officer acting in good faith and exercising due care in making an arrest for domestic abuse in an effort to comply with this subchapter shall have immunity from civil or criminal liability.

History. Acts 1991, No. 267, § 1; 1991, No. 1236, § 1; 2003, No. 651, § 4; 2009, No. 331, § 1; 2011, No. 810, § 1.

Amendments. The 2009 amendment, in (b), inserted (b)(2), redesignated the remaining text accordingly, inserted "Except as provided in subdivision (b)(2) of this section" in (b)(1), and made related changes.

The 2011 amendment added (d)(2).

CASE NOTES

Probation Revocation.

In a case where appellant contended that an order of protection did not comport with the requirements of the law because it was issued after a hearing without appellant receiving actual notice or an opportunity to participate therein, the revocation of probation based on the commission of a felony was appropriate because appellant violated the protective order under this section; by pleading guilty, appellant admitted that he knew the order existed, an element of the crime, and that he knowingly violated it. Appellant did not seek to appeal the order of protection, he did not raise a lack of notice before entering his guilty plea, and he did not appeal the judgment following the plea in that case; moreover, the circuit court had jurisdiction over any criminal act within its borders, and appellant admitted to committing the criminal act of violating the protective order. Standridge v. State, 2012 Ark. App. 563, — S.W.3d — (2012).

CHAPTER 54

OBSTRUCTING GOVERNMENTAL OPERATIONS

SUBCHAPTER.

Subchapter 1 — General Provisions

5-54-101. Definitions.

CASE NOTES

Governmental Function.

Vehicle passenger, who was allegedly arrested by a state police officer for refusing to provide identification, stated a claim against the officer for a Fourth Amendment violation. There was no probable cause to arrest the passenger under § 5-54-102(a)(1) for obstructing the performance of a governmental function; the officer's authority under Ark. R. Crim. P. 2.2 to request information did not establish a "governmental function" within the meaning of subdivision (6) of this section because there was no showing that the passenger had a duty under Arkansas law to furnish identification. Stufflebeam v. Harris, 521 F.3d 884 (8th Cir. 2008).

5-54-102. Obstructing governmental operations.

(a) A person commits the offense of obstructing governmental operations if the person:

(1) Knowingly obstructs, impairs, or hinders the performance of any governmental function;

(2) Knowingly refuses to provide information requested by an employee of a governmental agency relating to the investigation of a case brought under Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq., and is the physical custodian of the child in the case;

(3) Fails to submit to court-ordered scientific testing by a noninvasive procedure to determine the paternity of a child in a case brought under Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq.; or

(4) Falsely identifies himself or herself to a law enforcement officer or a code enforcement officer.

(b)(1) Obstructing governmental operations by using or threatening to use physical force is a Class A misdemeanor.

(2) A second or subsequent offense of obstructing governmental operations under subdivision (a)(4) of this section is a Class A misdemeanor.

(3) Otherwise, obstructing governmental operations is a Class C misdemeanor.

(c) This section does not apply to:

(1) Unlawful flight by a person charged with an offense;

(2) Refusal to submit to arrest;

(3) Any means of avoiding compliance with the law not involving affirmative interference with a governmental function unless specifically set forth in this section; or

(4) Obstruction, impairment, or hindrance of what a person reasonably believes is a public servant's unlawful action.

(d)(1) As used in this section, "code enforcement officer" means an individual charged with the duty of enforcing a municipal code, municipal ordinance, or municipal regulation as defined by a municipal code, municipal ordinance, or municipal regulation.

(2) "Code enforcement officer" includes a municipal animal control officer.

History. Acts 1975, No. 280, § 2802; A.S.A. 1947, § 41-2802; Acts 1995, No. 1182, § 1; 1999, No. 577, § 1; 2005, No. 1994, § 453; 2007, No. 163, § 1; 2009, No. 342, § 1; 2009, No. 748, § 25.

Amendments. The 2009 amendment by No. 342 inserted "or a code enforcement officer" in (a)(4) and made a related change; and added (d).

The 2009 amendment by No. 748 made stylistic changes in (b)(2).

CASE NOTES

Search And Seizure.

Vehicle passenger, who was allegedly arrested by a state police officer for refusing to provide identification, stated a claim against the officer for a Fourth Amendment violation. There was no probable cause to arrest the passenger under subdivision (a)(1) of this section for obstructing the performance of a governmental function; the officer's authority under Ark. R. Crim. P. 2.2 to request information did not provide probable cause because there was no showing that the passenger had a duty under Arkansas law to furnish identification. Stufflebeam v. Harris, 521 F.3d 884 (8th Cir. 2008).

5-54-103. Resisting arrest — Refusal to submit to arrest.

CASE NOTES

Evidence.

In a case in which defendant appealed the revocation of her suspended sentence, defendant challenged the sufficiency of the evidence supporting the finding that she committed the new offense of battery in the second degree on a police officer; however, the appellate court did not address defendant's argument because the evidence introduced at the revocation hearing was sufficient to support the finding that defendant committed the offense of resisting arrest. Gasca v. State, 2013 Ark. App. 214, — S.W.3d — (2013).

5-54-104. Interference with a law enforcement or code enforcement officer.

(a)(1) A person commits the offense of interference with a law enforcement officer if he or she knowingly employs or threatens to employ physical force against a law enforcement officer engaged in performing his or her official duties.

(2) A person commits the offense of interference with a code enforcement officer if he or she knowingly employs or threatens to employ physical force against a code enforcement officer engaged in performing his or her official duties.

(b)(1) Interference with a law enforcement officer or a code enforcement officer is a Class C felony if:

(A) The person uses or threatens to use deadly physical force; or

(B) The person is assisted by one (1) or more other persons and physical injury to the law enforcement officer or code enforcement officer results.

(2) Otherwise, interference with a law enforcement officer or a code enforcement officer is a Class A misdemeanor.

(c)(1) As used in this section, "code enforcement officer" means an individual charged with the duty of enforcing a municipal code, municipal ordinance, or municipal regulation as defined by a municipal code, municipal ordinance, or municipal regulation.

(2) "Code enforcement officer" includes an animal control officer.

History. Acts 1975, No. 280, § 2804; 1977, No. 360, § 14; A.S.A. 1947, § 41-2804; Acts 2009, No. 343, § 1.

Amendments. The 2009 amendment, in (a), inserted (a)(2) and redesignated the remaining text accordingly; in (b), inserted "or a code enforcement officer" in (b)(1) and (b)(2) and inserted "or code enforcement officer" in (b)(1)(B); and added (c).

5-54-105. Hindering apprehension or prosecution.

CASE NOTES

Analysis

Evidence.
Knowledge and Intent.

Evidence.

Defendant's conviction for hindering the apprehension or prosecution of her child's abuser, in violation of subdivisions (a)(6) or (7) of this section, was supported by the evidence because defendant consistently told medical personnel and the police that her 23-month-old child's life-threatening brain injury was caused by falling from a top bunk bed. Sullivan v. State, 2012 Ark. 74, 386 S.W.3d 507 (2012).

Knowledge and Intent.

Evidence that defendant, the husband of a murder victim, met with his stepdaughter, the murderer, after the murder; he denied knowledge of her whereabouts; he admitted giving her money and a car to go to Mississippi; and he had a sexual relationship with her; was sufficient to convict him of hindering her apprehension under this section. Devor v. State, 2012 Ark. App. 82, — S.W.3d — (2012).

5-54-110. First degree escape.

(a) A person commits the offense of first degree escape if:

(1) At any time, including from the point of departure from confinement to the return to confinement, aided by another person actually present, he or she uses or threatens to use physical force in escaping from:

(A) Custody;

(B) A correctional facility;

(C) A juvenile detention facility; or

(D) A youth services program; or

(2) At any time, including from the point of departure from confinement to the return to confinement, he or she uses or threatens to use a deadly weapon in escaping from:

(A) Custody;

(B) A correctional facility;

(C) A juvenile detention facility; or

(D) A youth services program.

(b)(1) First degree escape is a Class A felony if, at the time of the escape, the person is in the custody of:

(A) The Department of Correction;

(B) The Department of Community Correction; or

(C) A law enforcement agency.

(2) Otherwise first degree escape is a Class C felony.

History. Acts 1975, No. 280, § 2810; A.S.A. 1947, § 41-2810; Acts 1997, No. 1229, § 3; 1997, No. 1299, § 3; 2003, No. 1348, § 1; 2005, No. 1994, § 254; 2009, No. 478, § 1.

Amendments. The 2009 amendment rewrote (b).

5-54-111. Second degree escape.

(a) A person commits the offense of second degree escape if he or she:

(1) At any time, including from the point of departure from confinement to the return to confinement, uses or threatens to use physical force in escaping from custody;

(2) Having been found guilty of a felony, escapes from custody;

(3) Escapes from a correctional facility;

(4) Escapes from a juvenile detention facility; or

(5) Escapes from a youth services program.

(b)(1) Second degree escape is a Class B felony if, at the time of the escape, the person is in the custody of:

(A) The Department of Correction;

(B) The Department of Community Correction; or

(C) A law enforcement agency.

(2) Otherwise second degree escape is a Class D felony.

History. Acts 1975, No. 280, § 2811; A.S.A. 1947, § 41-2811; Acts 1997, No. 1229, § 4; 1997, No. 1299, § 4; 2003, No. 1348, § 2; 2005, No. 1994, § 255; 2009, No. 478, § 2.

Amendments. The 2009 amendment rewrote (b).

CASE NOTES

Proof.

Because defendant was not "in custody" at the time defendant violated the conditions of defendant's release on bond under § 16-90-122(a)(2), the circuit court erred in denying defendant's motion for directed verdict on defendant's conviction for second-degree escape under subdivision (a)(2) of this section. Magness v. State, 2012 Ark. 16, 386 S.W.3d 390 (2012).

Cited: Avery v. State, 93 Ark. App. 112, 217 S.W.3d 162 (2005).

5-54-112. Third degree escape.

(a) A person commits the offense of third degree escape if he or she escapes from custody.

(b) It is a defense to a prosecution under this section that the person escaping was in custody pursuant to an unlawful arrest.

(c)(1) Third degree escape is a Class C felony if, at the time of the escape, the person is in the custody of:

(A) The Department of Correction;

(B) The Department of Community Correction; or

(C) A law enforcement agency.

(2) Otherwise third degree escape is a Class A misdemeanor.

History. Acts 1975, No. 280, § 2812; A.S.A. 1947, § 41-2812; Acts 2009, No. 478, § 3.

Amendments. The 2009 amendment rewrote (c).

5-54-117. Assisting in or furnishing an implement for escape.

(a) A person commits the offense of assisting in or furnishing an implement for escape if, with the purpose of facilitating escape, he or she:

(1) Introduces an implement for escape into a correctional facility;

(2) Provides an inmate in a correctional facility with an implement for escape;

(3) Provides a person in custody with an implement for escape;

(4) Provides transportation of any kind that is used in the commission or furtherance of an escape from a correctional facility;

(5) Furnishes food, clothing, finances, or other aid to a person who escaped from a correctional facility; or

(6) Provides shelter or housing to a person who escaped from a correctional facility.

(b)(1) Assisting in or furnishing an implement for escape is a Class B felony if the implement for escape provided is a deadly weapon.

(2) Otherwise assisting in or furnishing an implement for escape is a Class C felony.

History. Acts 1975, No. 280, § 2817; A.S.A. 1947, § 41-2817; Acts 2009, No. 478, § 4; 2011, No. 1120, § 11.

Amendments. The 2009 amendment, in (a), inserted "assisting in or" in the introductory language, inserted (a)(4) through (a)(6), and made related changes; in (b), substituted "Class B" for "Class C" in (b)(1) and substituted "Class C" for "Class D" in (b)(2).

The 2011 amendment substituted "assisting in or furnishing" for "furnishing" or variant in (b)(1) and (b)(2).

5-54-119. Furnishing, possessing, or using prohibited articles.

(a) A person commits the offense of furnishing a prohibited article if he or she knowingly:

(1) Introduces a prohibited article into a correctional facility, the Arkansas State Hospital, or a youth services program; or

(2) Provides a person confined in a correctional facility, the Arkansas State Hospital, or a youth services program with a prohibited article.

(b)(1)(A) Furnishing or providing a weapon, intoxicating beverage, controlled substance, moneys, a cellular telephone or other communication device, the components of a cellular telephone or other communication device, or any other items that would facilitate an escape, engaging in a continuing criminal enterprise, § 5-64-405, or violence within a facility is a Class B felony.

(B) Otherwise, furnishing a prohibited article is a Class C felony.

(2) This section does not apply to a religious official who supplies sacramental wine labeled as sacramental wine to an inmate in the Department of Correction for the sole purpose of an approved religious service, pursuant to rules and regulations promulgated by the Board of Corrections.

(c)(1) A person commits possessing a prohibited article if, being an inmate of a correctional facility or in the custody of a correctional facility, the person knowingly possesses a:

(A) Cellular telephone or other communication device; or

(B) Component of a cellular telephone or other communication device.

(2) Possessing a prohibited article is a Class B felony.

(d)(1) A person commits using a prohibited article if, being an inmate of a correctional facility or in the custody of a correctional facility, the person knowingly uses a cellular telephone or other communication device to commit or to attempt, conspire, or solicit to commit:

(A) An escape from the custody of the correctional facility;

(B) Engaging in a continuing criminal enterprise, § 5-64-405; or

(C) A violent felony as defined at § 5-4-501(d)(2).

(2) Using a prohibited article is a Class A felony.

History. Acts 1975, No. 280, § 2819; 1977, No. 360, § 17; 1985, No. 686, § 1; A.S.A. 1947, § 41-2819; Acts 1988 (4th Ex. Sess.), No. 8, § 2; 1988 (4th Ex. Sess.), No. 23, § 2; 2005, No. 168, § 1; 2005, No. 1994, § 258; 2009, No. 479, § 1; 2013, No. 129, § 1.

Amendments. The 2009 amendment added (c) and (d).

The 2013 amendment substituted "a correctional facility or in the custody of a correctional facility" for "the Department of Correction" in (c)(1) and (d)(1); substituted "uses" for "used" in (d)(1); and substituted "the correctional facility" for "the Department of Correction" in (d)(1)(A).

RESEARCH REFERENCES

ALR. Propriety of lesser included offense charge in state prosecution of narcotics defendant — Marijuana cases. 1 A.L.R.6th 549.

Propriety of lesser included offense charge in state prosecution of narcotics defendant — Cocaine cases. 2 A.L.R.6th 551.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

5-54-120. Failure to appear.

(a) A person commits the offense of failure to appear if he or she fails to appear without reasonable excuse subsequent to having been:

(1) Cited or summonsed as an accused; or

(2) Lawfully set at liberty upon condition that he or she appear at a specified time, place, and court.

(b) Failure to appear is a:

(1) Class C felony if the required appearance was in regard to a pending charge or disposition of a felony charge either before or after a determination of guilt of the charge;

(2) Class D felony if the required appearance was in regard to an order to appear issued before a revocation hearing under § 16-93-307 and the defendant was placed on probation or suspended sentence for a felony offense;

(3) Class A misdemeanor if the required appearance was in regard to a pending charge or disposition of a Class A misdemeanor charge either before or after a determination of guilt of the charge;

(4) Class B misdemeanor if the required appearance was in regard to a pending charge or disposition of a Class B misdemeanor charge either before or after a determination of guilt of the charge;

(5) Class B misdemeanor if the required appearance was in regard to a pending charge or disposition of a Class C misdemeanor charge either before or after a determination of guilt of the charge;

(6) Class B misdemeanor if the required appearance was in regard to a pending charge or disposition of a Class D misdemeanor charge either before or after a determination of guilt of the charge;

(7) Class B misdemeanor with the same penalty as the unclassified misdemeanor in the pending charge or disposition if the required appearance was in regard to a pending charge or disposition of an unclassified misdemeanor either before or after a determination of guilt on the charge; and

(8) Class C misdemeanor if the required appearance was in regard to a pending charge or disposition of a violation either before or after a determination of guilt of the charge.

(c) This section does not apply to an order to appear imposed as a condition of suspension or probation under § 5-4-303.

History. Acts 1975, No. 280, § 2820; A.S.A. 1947, § 41-2820; Acts 1991, No. 916, § 1; 2011, No. 514, § 1; 2011, No. 570, § 32; 2013, No. 1193, § 1.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment by No. 514 rewrote (b) and (c).

The 2011 amendment by No. 570, in (d), substituted "under § 5-4-303" for "pursuant to § 5-4-303" and "under § 16-93-307" for "pursuant to § 5-4-310."

The 2013 amendment added (b)(2); and redesignated (c)(1) through (6) as (b)(3) through (8).

5-54-122. Filing false report with law enforcement agency.

(a) As used in this section, "report" means any communication, either written or oral, sworn or unsworn.

(b) A person commits the offense of filing a false report if he or she files a report with any law enforcement agency or prosecuting attorney's office of any alleged criminal wrongdoing on the part of another person knowing that the report is false.

(c)(1) Filing a false report is a Class D felony if:

(A) The alleged criminal wrongdoing is a capital offense, Class Y felony, Class A felony, or Class B felony;

(B) The law enforcement agency or prosecuting attorney's office to whom the false report is made has expended in excess of five hundred dollars ($500) in order to investigate the false report, including the costs of labor;

(C) Physical injury results to any person as a result of the false report;

(D) The false report is made in an effort by the person filing the false report to conceal his or her own criminal activity; or

(E) The false report results in another person being arrested.

(2) Otherwise, filing a false report is a Class A misdemeanor.

History. Acts 1989, No. 690, §§ 1-3; 2007, No. 827, § 46.

CASE NOTES

Evidence.

Defendant's conviction for filing a false police report under subdivision (c)(1)(D) of this section was modified to reflect the misdemeanor offense of filing a false police report under subdivision (c)(2) where the state failed to prove that defendant was attempting to defraud her bank out of money in addition to filing a false police report; the bank employee never testified that defendant tried to defraud the bank out of money, only that defendant reported some fraudulent activity on her account. Boveia v. State, 94 Ark. App. 252, 228 S.W.3d 550 (2006).

Evidence was sufficient to support defendant's conviction for filing a false police report because an officer testified that defendant abandoned his vehicle during an attempted traffic stop, the car was then impounded, and several days later, defendant reported the vehicle stolen. Thus, because defendant abandoned the vehicle, he knew at the time of his report that it had not been stolen. Butler v. State, 2011 Ark. App. 708, — S.W.3d — (2011).

5-54-125. Fleeing.

(a) If a person knows that his or her immediate arrest or detention is being attempted by a duly authorized law enforcement officer, it is the lawful duty of the person to refrain from fleeing, either on foot or by means of any vehicle or conveyance.

(b) Fleeing is a separate offense and is not considered a lesser included offense or component offense with relation to other offenses which may occur simultaneously with the fleeing.

(c) Fleeing on foot is considered a Class C misdemeanor, except under the following conditions:

(1) If the defendant has been previously convicted of fleeing on foot anytime within the past one-year period, a subsequent fleeing on foot offense is a Class B misdemeanor;

(2) If property damage occurs as a direct result of the fleeing on foot, the fleeing on foot offense is a Class A misdemeanor; or

(3) If serious physical injury occurs to any person as a direct result of the fleeing on foot, the fleeing on foot offense is a Class D felony.

(d)(1)(A) Fleeing by means of any vehicle or conveyance is considered a Class A misdemeanor.

(B) A person convicted under subdivision (d)(1)(A) of this section shall serve a minimum of two (2) days in jail.

(2) Fleeing by means of any vehicle or conveyance is considered a Class D felony if, under circumstances manifesting extreme indifference to the value of human life, a person purposely operates the vehicle or conveyance in such a manner that creates a substantial danger of death or serious physical injury to another person.

(3) If serious physical injury to any person occurs as a direct result of fleeing by means of any vehicle or conveyance, the fleeing by means of any vehicle or conveyance offense is a Class C felony.

(e) Regardless of the circumstances in subdivisions (c)(1)-(3) of this section, if the defendant is under twenty-one (21) years of age and has not been previously convicted of fleeing, the offense of fleeing is a Class C misdemeanor.

(f) In addition to any other penalty, if the defendant is convicted of violating subsection (d) of this section, the court shall instruct the Office of Driver Services of the Department of Finance and Administration to suspend or revoke the defendant's driver's license for at least six (6) months but not more than one (1) year.

History. Acts 1977, No. 196, §§ 1, 2; A.S.A. 1947, §§ 41-2822, 41-2823; Acts 1993, No. 1217, § 1; 1995, No. 410, § 1; 2009, No. 1304, § 1.

Amendments. The 2009 amendment substituted "If" for "When" at the beginning of (c)(2), (c)(3), and (d)(3); added "or" at the end of (c)(2); added the (d)(1)(A) designation; added (d)(1)(B); and in (f), substituted "shall" for "may" and "at least six (6) months but" for "a period of."

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Criminal Law, 29 U. Ark. Little Rock L. Rev. 849.

CASE NOTES

Analysis

Evidence.
Fleeing As Underlying Felony.
Review.
Unauthorized Sentence.

Evidence.

Substantial evidence supported defendant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while

the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; after an officer turned on his blue lights, defendant accelerated to a speed of 100 miles per hour and struck an SUV, causing it to flip and resulting in injuries to the driver, and that conduct sufficiently satisfied the elements of aggravated assault and fleeing. Barber v. State, 2010 Ark. App. 210, 374 S.W.3d 709 (2010).

Evidence was sufficient to sustain defendant's fleeing conviction because an officer testified that he saw a man whom he later identified as defendant flee on foot after an attempted traffic stop and found defendant's identification card and cell phone in the abandoned vehicle. Butler v. State, 2011 Ark. App. 708, — S.W.3d — (2011).

Fleeing As Underlying Felony.

In a fleeing and manslaughter case where an officer died during a high speed pursuit of defendant, who fled from a store after stealing candy, the trial court did not err by submitting a manslaughter instruction as fleeing was an appropriate underlying felony to support a conviction under § 5-10-104. Fondren v. State, 364 Ark. 498, 221 S.W.3d 333 (2006).

During defendant's trial, the court properly gave an instruction to the jury regarding manslaughter, in violation of § 5-10-104(4)(A), after an officer was killed in a high-speed chase because while the manslaughter charge might have arisen from the same events as felony fleeing, the legislature clearly intended that fleeing be punishable as a separate offense. Fondren v. State, 364 Ark. 498, 221 S.W.3d 333 (2006).

Fleeing can serve as an underlying felony for another offense. Fondren v. State, 364 Ark. 498, 221 S.W.3d 333 (2006).

Fleeing is not to merge into a larger crime. Fondren v. State, 364 Ark. 498, 221 S.W.3d 333 (2006).

Review.

Appellant's sufficiency argument was preserved only for his conviction of leaving the scene of an accident, as he did not challenge his identity in his directed verdict motion for the fleeing apprehension charge. Flemons v. State, 2013 Ark. App. 280, — S.W.3d — (2013).

Unauthorized Sentence.

Court entered an illegal sentence by sentencing the petitioner to seventy-two-months' imprisonment on a misdemeanor, because if property damage occurred as a direct result of fleeing on foot, the offense was a Class A misdemeanor, and a sentence for a Class A misdemeanor should not exceed one year. Arter v. State, 2012 Ark. App. 327, — S.W.3d — (2012).

Cited: Jefferson v. State, 372 Ark. 307, 276 S.W.3d 214 (2008).

5-54-126. Killing or injuring animals used by law enforcement or search and rescue dogs.

(a) Any person who:

(1) Purposely kills or physically injures;

(2) Purposely causes physical contact that is of a nature likely to cause physical injury to; or

(3) Attempts to cause physical contact that is of a nature likely to cause physical injury to,

any animal owned by or used by a law enforcement agency or any search and rescue dog upon conviction is guilty of a Class D felony.

(b) A person who purposely interferes with or obstructs an animal owned by or used by a law enforcement agency or a search and rescue dog used by a law enforcement officer in the discharge or attempted discharge of his or her duties upon conviction is guilty of a Class A misdemeanor.

(c) As used in this section, "search and rescue dog" means a dog:

(1) In training for or trained for the purpose of search and rescue;

(2) Owned by an independent handler or member of a search and rescue team;

(3) Used in conjunction with a local law enforcement organization or an emergency services organization for the purpose of locating a missing person or evidence of arson;

(4) Trained for the purpose of locating controlled substances; or

(5) Trained to assist in the apprehension of persons alleged to have violated any law.

(d) A person guilty of violating this section is also required to make restitution to the law enforcement agency or owner of the animal that suffered a loss due to the violation, including without limitation reimbursement for veterinary bills, and the replacement cost of the animal if the animal is permanently disabled or killed as a result of the violation.

History. Acts 1985, No. 446, §§ 1, 2; A.S.A. 1947, §§ 41-2858, 41-2859; Acts 1987, No. 884, § 1; 1999, No. 571, § 1; 2009, No. 530, § 1.

Amendments. The 2009 amendment inserted (a)(2), (a)(3), (b), (c)(4), and (c)(5), and redesignated the remaining subsections and subdivisions accordingly; in (a), deleted "without just cause" following "Any person who" in the introductory language, and inserted "upon conviction" in (a)(3); rewrote (c), which read: "Any person guilty of violating subsection (a) of this section is also required to make restitution to the law enforcement agency or owner so aggrieved"; and made related and minor stylistic changes.

5-54-130. Radio voice privacy adapters.

(a) It is unlawful for any person other than a law enforcement officer or law enforcement agency, a fire department, the Department of Health, or an employee of a law enforcement agency, a fire department, or the Department of Health to own or operate or possess any radio equipment described as a voice privacy adapter or any other device capable of receiving and decoding police department, fire department, or Department of Health communications that have been transmitted through a voice privacy adapter.

(b) This section does not apply to any police department or agency, any other agency having law enforcement responsibility, a fire department of any political subdivision of this state, or to the Department of Health.

(c) Any person who violates this section is guilty of a violation and upon conviction shall be punished by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500).

(d) As used in this section, "person" means any person, firm, corporation, association, club, copartnership, society, or any other organization.

History. Acts 1975, No. 973, §§ 1-4; A.S.A. 1947, §§ 41-2854 — 41-2857; Acts 2005, No. 1994, § 51; 2011, No. 178, § 1.

Amendments. The 2011 amendment, in (a), substituted "law enforcement agency, a fire department, the Department of Health, or an employee of a law enforcement agency, a fire department, or

the Department of Health" for "law enforcement agency, or fire department or employee of a law enforcement agency or fire department" and "police department, fire department, or Department of Health" for "police and fire department"; and added "or to the Department of Health" at the end of (b).

Subchapter 2 — Terrorism

SECTION.
5-54-201. Definitions.
5-54-206. Terrorism — Enhanced penalties.

5-54-201. Definitions.

As used in this subchapter:

(1) "Act of terrorism" means:

(A) Any act that causes or creates a risk of death or serious physical injury to five (5) or more persons;

(B) Any act that disables or destroys the usefulness or operation of any communications system;

(C) Any act or any series of two (2) or more acts committed in furtherance of a single intention, scheme, or design that disables or destroys the usefulness or operation of a computer network, computers, computer programs, or data used by:

(i) Any industry;

(ii) Any class of business;

(iii) Five (5) or more businesses;

(iv) The United States Government;

(v) State government;

(vi) Any unit of local government;

(vii) A public utility;

(viii) A manufacturer of pharmaceuticals;

(ix) A national defense contractor; or

(x) A manufacturer of chemical or biological products used in connection with agricultural production;

(D) Any act that disables or causes substantial damage to or destruction of any structure or facility used in or in connection with:

(i) Ground, air, or water transportation;

(ii) The production or distribution of electricity, gas, oil, or other fuel;

(iii) The treatment of sewage or the treatment or distribution of water; or

(iv) Controlling the flow of any body of water;

(E) Any act that causes substantial damage to or destruction of livestock or crops or a series of two (2) or more acts committed in furtherance of a single intention, scheme, or design which, in the aggregate, causes substantial damage to or destruction of livestock or crops;

(F) Any act that causes substantial damage to or destruction of:

(i) Any hospital; or

(ii) Any building or facility used by:

(a) The United States Government;

(b) State government;

(c) Any unit of local government;

(d) A national defense contractor;

(e) A public utility; or

(f) A manufacturer of chemical or biological products used in or in connection with agricultural production or the storage or processing of agricultural products or the preparation of agricultural products for food or food products intended for resale or for feed for livestock; or

(G) Any act that causes damage of five hundred thousand dollars ($500,000) or more to any building or set of buildings;

(2) "Agricultural products" means crops and livestock;

(3) "Agricultural production" means the breeding and growing of livestock and crops;

(4) "Biological products used in agriculture" means, but is not limited to, seeds, plants, and deoxyribonucleic acid (DNA) of plants or animals altered for use in crop or livestock breeding or production or which are sold, intended, designed, or produced for use in crop production;

(5) "Communications system" means any works, property, or material of any radio, telegraph, telephone, microwave, cable station, or system;

(6)(A) "Computer" means a device that accepts, processes, stores, retrieves, or outputs data.

(B) "Computer" includes, but is not limited to, auxiliary storage and telecommunications devices;

(7) "Computer network" means a set of related, remotely connected devices and any communications facilities including more than one (1) computer with the capability to transmit data among them through communication facilities;

(8) "Computer program" means a series of coded instructions or statements in a form acceptable to a computer that causes the computer to process data and supply the results of data processing;

(9)(A) "Data" means representations of information, knowledge, facts, concepts, or instructions, including program documentation, which are prepared in a formalized manner and are stored or processed in or transmitted by a computer.

(B) Data may be stored in any form including, but not limited to, magnetic or optical storage media, punch cards, or data stored internally in the memory of a computer;

(10) "Hoax substance" means any substance that would cause a reasonable person to believe that the substance is a:

(A) Dangerous chemical or biological agent;

(B) Poison;

(C) Harmful radioactive substance; or

(D) Similar substance;

(11) "Livestock" means animals bred or raised for human consumption;

(12) "Material support or resources" means:
(A) Currency or other financial securities;
(B) Financial services;
(C) Lodging;
(D) Training;
(E) Safe house;
(F) False documentation or identification;
(G) Communications equipment;
(H) Facilities;
(I) Weapons;
(J) Lethal substances;
(K) Explosives;
(L) Personnel;
(M) Transportation;
(N) Expert services or expert assistance; and
(O) Any other kind of physical assets or intangible property;

(13)(A) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.

(B) "Person" includes, without limitation, any:

(i) Charitable organization, whether incorporated or unincorporated;

(ii) Professional fund raiser, professional solicitor, limited liability company, association, joint stock company, trust, trustee, or any group of people formally or informally affiliated or associated for a common purpose; and

(iii) Officer, director, partner, member, or agent of any person;

(14) "Render criminal assistance" means to do any of the following with the purpose of preventing, hindering, or delaying the discovery or apprehension of a person whom he or she knows or believes has committed an offense under this subchapter or is being sought by law enforcement officials for the commission of an offense under this subchapter, or with the purpose to assist a person in profiting or benefiting from the commission of an offense under this subchapter:

(A) Harbor or conceal the person;
(B) Warn the person of impending discovery or apprehension;
(C) Provide the person with:
(i) Money;
(ii) Transportation;
(iii) A weapon;
(iv) A disguise;
(v) False identification documents; or
(vi) Any other means of avoiding discovery or apprehension;

(D) Prevent or obstruct, by means of force, intimidation, or deception, anyone from performing an act that might aid in the discovery or apprehension of the person;

(E) Suppress, by any act of concealment, alteration, or destruction, any physical evidence that might aid in the discovery or apprehension of the person or in the lodging of a criminal charge against the person;

(F) Aid the person to protect or expeditiously profit from an advantage derived from the crime; or

(G)(i) Provide expert services or expert assistance to the person.

(ii) Providing expert services or expert assistance shall not be construed to apply to:

(a) A licensed attorney who discusses with a client the legal consequences of a proposed course of conduct or advises a client of legal or constitutional rights; or

(b) A licensed medical worker who provides emergency medical treatment to a person whom the licensed medical worker believes committed an offense under this subchapter if, as soon as reasonably practicable either before or after providing the medical treatment, the licensed medical worker notifies a law enforcement agency; and

(15) "Terrorist" means any person who engages in or is about to engage in a terrorist act with the purpose to intimidate or coerce a significant portion of the civilian population or influence the policy of a government or a unit of government.

History. Acts 2003, No. 1342, § 3; 2007, No. 827, §§ 47, 48.

5-54-206. Terrorism — Enhanced penalties.

(a) Any person who is found guilty of or who pleads guilty or nolo contendere to terrorism, § 5-54-205, may be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if the person's acts caused serious physical injury to a law enforcement officer, firefighter, or emergency service technician providing emergency assistance at the scene of the act of terrorism.

(b) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(c) Any person sentenced under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.

History. Acts 2003, No. 1342, § 3; 2007, No. 1047, § 2.

CHAPTER 55

FRAUD AGAINST THE GOVERNMENT

SUBCHAPTER.

1. Medicaid Fraud Act.
3. Claims for Benefits.
5. Lottery Fraud.
6. Election, Petition, and Ballot Fraud.

Subchapter 1 — Medicaid Fraud Act

SECTION.

Effective Dates. Acts 2011, No. 1154, § 3: Apr. 4, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the statutes authorizing procedures for the recovery of false or fraudulent Medicaid claims are in immediate need of this revision to encourage citizens of the state to help recover public funds and Medicaid moneys that have been wrongfully misappropriated and will otherwise be lost forever; and that the provisions of this act are essential to successful operations and activities of the Medicaid Fraud Control Unit of the Attorney General's office and the Department of Human Services. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-55-103. Unlawful acts — Classification.

(a)(1) It is unlawful for any person to commit medicaid fraud as prohibited by § 5-55-111.

(2) Medicaid fraud is a:

(A) Class B felony if the aggregate amount of payments illegally claimed is two thousand five hundred dollars ($2,500) or more; and

(B) Class C felony if the aggregate amount of payments illegally claimed is less than two thousand five hundred dollars ($2,500) but more than two hundred dollars ($200).

(3) Otherwise, medicaid fraud is a Class A misdemeanor.

(b)(1) A person commits illegal medicaid participation if:

(A) Having been found guilty of or having pleaded guilty or nolo contendere to the charge of medicaid fraud, theft of public benefits, § 5-36-202, or abuse of adults, § 5-28-101 et seq., as defined in the Arkansas Criminal Code, § 5-1-101 et seq., that person participates directly or indirectly in the Arkansas Medicaid Program; or

(B) As a certified health provider, enrolled in the Arkansas Medicaid Program pursuant to Title XIX of the Social Security Act, as amended, 42 U.S.C. § 1396 et seq., or the fiscal agent of the certified health provider, employs, or engages as an independent contractor, or engages as a consultant, or otherwise permits the participation in the business activities of the certified health provider, any person who has pleaded guilty or nolo contendere to or has been found guilty of a charge of medicaid fraud, theft of public benefits, § 5-36-202, or abuse of adults, § 5-28-101 et seq., as defined in the Arkansas Criminal Code, § 5-1-101 et seq.

(2) Illegal medicaid participation is a:
(A) Class A misdemeanor for the first offense;
(B) Class D felony for the second offense; and
(C) Class C felony for the third offense and subsequent offenses.

History. Acts 1979, No. 823, § 3; A.S.A. 1947, § 41-4403; Acts 1993, No. 1291, § 2; 2003, No. 1122, § 1; 2007, No. 827, § 49.

5-55-111. Criminal acts constituting medicaid fraud.

CASE NOTES

In General.

Impropriety requirement for tortuous interference was not satisfied by the health services company's violation of the federal anti-kickback statute, 42 U.S.C.S. § 1320a-7b(b), and comparable Arkansas statutes, this section, and the Arkansas Medicaid Fraud False Claims Act, § 20-77-902; even though the company's policy, which denied privileges to doctors who acquired or held an interest in a competitor hospital, created a disincentive for the doctors to maintain ownership in a competing hospital, the policy did not create a disincentive for them to refer their patients to facilities other than the company's hospitals. Baptist Health v. Murphy, 365 Ark. 115, 226 S.W.3d 800 (2006).

5-55-113. Reward for information.

(a) The court may pay a person such sums, not exceeding ten percent (10%) of the aggregate penalty recovered, as the court may deem just, for information the person may have provided that led to detecting and bringing to trial and punishment a person guilty of violating the medicaid fraud laws.

(b)(1) Upon the disposition of any criminal action relating to a violation of this subchapter in which a penalty is recovered, the Attorney General may petition the court on behalf of a person who may have provided information that led to detecting and bringing to trial and punishment a person guilty of medicaid fraud to award the person in an amount commensurate with the quality and usefulness of the information determined by the court to have been provided, in accordance with the requirements of this subchapter.

(2) If the Attorney General elects not to petition the court on behalf of the person, the person may petition the court on his or her own behalf.

(c) Neither the state nor any defendant within the action is liable for expenses that a person incurs in bringing an action under this section.

(d) An employee or fiscal agents charged with the duty of referring or investigating a case of medicaid fraud who are employed by or contract with any governmental entity are not eligible to receive a reward under this section.

History. Acts 1993, No. 1300, § 1; 2011, No. 1154, § 2.

Amendments. The 2011 amendment substituted "Reward for information" for "Reward for the detection and punishment of medicaid fraud" in the section heading; and deleted "or in any case not more than one hundred thousand dollars

($100,000)" following "the aggregate penalty recovered" in (a).

Subchapter 3 — Claims for Benefits

SECTION.
5-55-301. Penalty — Notice — Prosecution.

5-55-301. Penalty — Notice — Prosecution.

(a)(1) It is unlawful for any person to knowingly make any material false statement or representation to the State Department for Social Security Administration Disability Determination for the purpose of:

(A) Obtaining any benefit or payment;

(B) Defeating or wrongfully increasing or wrongfully decreasing any claim for benefit or payment; or

(C) Aiding and abetting another person in violation of subdivisions (a)(1)(A) or (B) of this section.

(2) Upon conviction, a person who violates subdivision (a)(1) of this section is guilty of a Class D felony.

(b) A copy of subsection (a) of this section shall be placed on all forms prescribed by the State Department for Social Security Administration Disability Determination for the use of a person claiming a benefit, a provider participating in the claims process, and any other party involved in the claims process.

(c) When the department finds a violation of subsection (a) of this section, the Director of the State Department for Social Security Administration Disability Determination shall refer the matter for appropriate action to the prosecuting attorney of the district where the original claim was filed.

History. Acts 1995, No. 862, § 6; 2007, No. 827, § 50.

Subchapter 5 — Lottery Fraud

SECTION.
5-55-501. Lottery fraud.

Effective Dates. Acts 2011, No. 207, § 31: Mar. 8, 2011. Emergency clause provides: "It is found and determined by the General Assembly of the State of Arkansas that increasing the number of Arkansans obtaining postsecondary credentials is critical to the economic health of the state and its citizens; that the Arkansas Scholarship Lottery provides the opportunity for tens of thousands of Arkansans to obtain postsecondary education; that the deadline for scholarship applications is June 1; that the financial integrity of the Arkansas Scholarship Lottery is critical to the continued existence of the scholarships; that the reporting and research provisions of this act are critical for timely decisions by the General Assembly on scholarship awards; and that this act is immediately necessary because the Department of Higher Education must promulgate rules to implement this act well

before June 1, 2011, in order to provide eligible Arkansans the opportunity to apply for the scholarship. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-55-501. Lottery fraud.

(a) As used in this subchapter:

(1) "Lottery" means the same as defined in § 23-115-103 of the Arkansas Scholarship Lottery Act; and

(2) "Ticket or share" means the same as defined in § 23-115-103 of the Arkansas Scholarship Lottery Act.

(b) A person commits the offense of lottery fraud if he or she:

(1) Falsely makes, alters, forges, utters, passes, or counterfeits a ticket or share in a lottery with a purpose to defraud the Arkansas Lottery Commission; or

(2) Purposely influences the winning of a lottery prize through the use of coercion, fraud, deception, or tampering with lottery equipment or materials.

(c) A violation of this section is a Class D felony.

(d) In addition to the fine for a conviction under § 5-4-201, a person convicted of a violation of this section is subject to an additional fine of not more than fifty thousand dollars ($50,000).

History. Acts 2011, No. 207, § 1.

Subchapter 6 — Election, Petition, and Ballot Fraud

SECTION.
5-55-601. Petition fraud.

5-55-601. Petition fraud.

(a) As used in this section, "petition" means a petition under § 3-8-201 et seq., § 3-8-801 et seq., or § 7-9-101 et seq.

(b) A person commits the offense of petition fraud:

(1) If the person knowingly:

(A) Signs a name other than his or her name to a petition;

(B) Signs his or her name more than one (1) time to a petition; or

(C) Signs a petition when he or she is not legally entitled to sign the petition;

(2) If the person acting as a canvasser, notary, sponsor as defined under § 7-9-101, or agent of a sponsor:

(A) Signs a name other than his or her own to a petition;

(B) Prints a name, address, or birth date other than his or her own to a petition unless the signor requires assistance due to disability and the person complies with § 7-9-103;

(C) Solicits or obtains a signature to a petition knowing that the person signing is not qualified to sign the petition;

(D) Knowingly pays a person any form of compensation in exchange for signing a petition as a petitioner;

(E) Accepts or pays money or anything of value for obtaining signatures on a petition when the person acting as a canvasser, sponsor, or agent of a sponsor knows that the person acting as a canvasser's name or address is not included on the sponsor's list filed with the Secretary of State under § 7-9-601; or

(F) Knowingly misrepresents the purpose and effect of the petition or the measure affected for the purpose of causing a person to sign a petition;

(3) If the person acting as a canvasser knowingly makes a false statement on a petition verification form;

(4) If the person acting as a notary knowingly fails to witness a canvasser's affidavit by witnessing the signing of the instrument in person and either personally knowing the signor or by being presented with proof of the identity of the signer; or

(5) If the person acting as a sponsor files a petition or a part of a petition with the official charged with verifying the signatures knowing that the petition or part of the petition contains one (1) or more false or fraudulent signatures unless each false or fraudulent signature is clearly stricken by the sponsor before filing.

(c) Petition fraud is a Class A misdemeanor.

Acts 2013, No. 1432, § 9.

SUBTITLE 6. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, OR WELFARE

CHAPTER 60

GENERAL PROVISIONS

SUBCHAPTER.

Subchapter 1 — General Provisions

SECTION.

5-60-101. Abuse of a corpse.

(a) A person commits abuse of a corpse if, except as authorized by law, he or she knowingly:

(1) Disinters, removes, dissects, or mutilates a corpse; or

(2)(A) Physically mistreats or conceals a corpse in a manner offensive to a person of reasonable sensibilities.

(B) A person who conceals a corpse in a manner offensive to a person of reasonable sensibilities that results in the corpse remaining concealed is continuing in a course of conduct under § 5-1-109(e)(1)(B).

(C)(i) As used in this section, "in a manner offensive to a person of reasonable sensibilities" means in a manner that is outside the normal practices of handling or disposing of a corpse.

(ii) "In a manner offensive to a person of reasonable sensibilities" includes without limitation the dismembering, submerging, or burning of a corpse.

(b) Abuse of a corpse is a Class C felony.

History. Acts 1975, No. 280, § 2920; A.S.A. 1947, § 41-2920; Acts 2011, No. 1003, § 1; 2011, No. 1158, § 1.

Amendments. The 2011 amendment by No. 1003 added the (a)(2)(A) designation; inserted "or conceals" in (a)(2)(A); and added (a)(2)(B).

The 2011 amendment by No. 1158 substituted "Class C felony" for "Class D felony" in (b).

CASE NOTES

Analysis

Construction.
Applicability.
Evidence.
Relationship to Other Statutes.

Construction.

Prosecution for abuse of a corpse under subsection (a) of this section was barred by the three-year statute of limitations under § 5-1-109(b)(2) because it was not a continuing-course-of-conduct crime; once defendant disposed of the body parts in a pond, she was no longer physically mistreating the corpse. McClanahan v. State, 2010 Ark. 39, 358 S.W.3d 900 (2010).

Applicability.

Although beheading and dismembering a corpse fell within the confines of this section, defendant's conviction had to be dismissed because she was not charged with the crime before the three-year limitations period ran and the submerging of the body did not qualify as a continuing course of conduct crime to toll the limitations period. McClanahan v. State, 2009 Ark. App. 493, 324 S.W.3d 692 (2009), aff'd, 2010 Ark. 39, 358 S.W.3d 900 (2010).

Evidence.

Evidence was sufficient to sustain defendant's conviction for abuse of a corpse, where the victim's remains were found in 55-gallon garbage bags, secured by duct

tape, and covered with a tarp; defendant's mishandling or neglect of the victim's body constituted physical mistreatment that would offend a person of reasonable sensibilities. Dailey v. State, 101 Ark. App. 394, 278 S.W.3d 120 (2008).

Evidence did not support defendant's conviction for abuse of a corpse, as the delay in reporting the decedent's death (from 11:00 p.m until after the decedent's children left for school the next morning) had no adverse affect on the decedent's family and defendant did not knowingly mistreat the corpse in a manner offensive to a person of reasonable sensibilities. Hammonds v. State, 2010 Ark. App. 465, — S.W.3d — (2010).

Relationship to Other Statutes.

Oregon's abuse-of-a-corpse statute, Or. Rev. Stat. § 166.085, is similar to this Arkansas statute. McClanahan v. State, 2010 Ark. 39, 358 S.W.3d 900 (2010).

5-60-102. Prohibition on sales and distribution of novelty lighters.

(a)(1) As used in this section, "novelty lighter" means a product commonly used by consumers to ignite cigarettes, cigars, pipes, gas grills, or other combustible material that has entertaining audio or visual features that depict or resemble in physical form or function articles commonly recognized as appealing to or intended for use by children ten (10) years of age or younger, including without limitation lighters that depict or resemble cartoon characters, toys, guns, watches, musical instruments, vehicles, toy animals, food, or beverages or that play musical notes or have flashing lights or other entertaining features.

(2) "Novelty lighter" does not include:

(A) A lighter manufactured before 1980; or

(B) A lighter that lacks a device necessary to produce combustion or a flame.

(b)(1) The retail sale, offer of retail sale, gift, or distribution of any novelty lighter in Arkansas is prohibited.

(2) Subdivision (b)(1) of this section does not apply to a novelty lighter that is:

(A) Being actively transported through the state; or

(B) Located in a warehouse closed to the public for purposes of retail sales.

(c) A person who pleads guilty or nolo contendere to or is found guilty of violating this section is guilty of a violation and shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500) for each offense and shall pay court costs.

History. Acts 2009, No. 329, § 1; 2013, No. 232, § 1.

Amendments. The 2013 amendment inserted "gas grills, or other combustible material" in (a)(1).

5-60-112. Misconduct on bus — In general.

(a) As used in this section:

(1) "Bus" means any passenger bus or coach or other motor vehicle having a seating capacity of not fewer than fifteen (15) passengers operated by a bus transportation company for the purpose of carrying

passengers or cargo for hire, but not to include a bus or coach utilized exclusively to transport children to and from schools;

(2)(A) "Bus transportation company" means any person, group of persons, or corporation providing for-hire transport to passengers or cargo by a bus upon a highway of this state.

(B) "Bus transportation company" includes a bus transportation facility owned or operated by a local public body, municipality, public corporation, board, and commission, except a school district established under the laws of this state.

(C) "Bus transportation company" does not include a company utilizing a bus for transporting children to and from school;

(3) "Charter" means a group of persons who, pursuant to a common purpose and under a single contract and at a fixed charge for the vehicle in accordance with a bus transportation company's tariff, have acquired the exclusive use of a bus to travel together as a group to a specified destination; and

(4)(A) "Passenger" means any person served by a bus transportation company.

(B) "Passenger" includes a person accompanying or meeting another person who is transported by a bus transportation company and any person shipping or receiving cargo.

(b) It is unlawful while on a bus for any person to:

(1) Threaten a breach of the peace;

(2) Be under the influence of alcohol;

(3) Be unlawfully under the influence of a controlled substance;

(4) Ingest or have in his or her possession any controlled substance unless properly prescribed by a physician or medical facility;

(5) Drink intoxicating liquor of any kind in or upon any passenger bus, except a chartered bus; or

(6) Fail to obey a reasonable request or order of a bus driver or any authorized bus transportation company representative.

(c)(1) If any person violates any provision of subsection (b) of this section, the driver of the bus or person in charge may:

(A) Stop the bus at the place where the offense is committed or at the next regular or convenient stopping place of the bus; and

(B) Require the person to leave the bus.

(2) Any person violating any provision of subsection (b) of this section is deemed guilty of a Class C misdemeanor.

History. Acts 1983, No. 688, §§ 1, 2; A.S.A. 1947, §§ 41-2924, 41-2925; Acts 2005, No. 1994, § 495.

Publisher's Notes. This section is being set out to reflect the addition of (c)(2) which was omitted from the 2005 Replacement Volume.

5-60-116. Breathing, inhaling, possessing, selling, or drinking certain intoxicating compounds — Alcohol vaporizing devices prohibited.

(a)(1) It is unlawful for any person to knowingly:

(A) Breathe, inhale, or drink any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichlorathane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other similar substance or any gasoline or similar substance for the purpose of inducing a condition of intoxication, stupefaction, depression, giddiness, paralysis, irrational behavior, or in any manner changing, distorting, or disturbing the auditory, visual, or mental processes;

(B) Breathe or inhale any compound, liquid, or chemical containing ethyl alcohol for the purpose of inducing a condition of intoxication;

(C) Possess any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichlorathane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, ethyl alcohol, or any other substance that will induce a condition of intoxication through breathing or inhalation for the purpose of violating subdivision (a)(1)(A) or subdivision (a)(1)(B) of this section;

(D) Sell, offer for sale, deliver, give, or possess with the intent to sell, deliver, or give to any other person any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichlorathane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, ethyl alcohol, or any other substance that will induce a condition of intoxication through breathing or inhalation if he or she has reasonable cause to believe that the compound, liquid, or chemical sold, offered for sale, delivered, given, or possessed with the intent to sell, deliver, or give will be used for the purpose of violating subdivision (a)(1)(A) or subdivision (a)(1)(B) of this section; or

(E) Manufacture, sell, give, deliver, possess, or use an alcohol vaporizing device.

(2) For the purposes of this section, any condition induced as provided in subdivision (a)(1)(A) or subdivision (a)(1)(B) of this section is an intoxicated condition.

(b)(1) This section does not apply to any person who commits any act described in this section pursuant to the direction or prescription of a licensed physician or dentist authorized to direct or prescribe the act.

(2) This section does not apply to the inhalation of anesthesia for a medical purpose or dental purpose.

(c) Upon conviction, a person who violates this section is guilty of a Class B misdemeanor.

(d)(1) As used in this section, "alcohol vaporizing device" means a device, a machine, an apparatus, or an appliance that is designed or marketed for the purpose of mixing ethyl alcohol with pure or diluted oxygen or any other gas to produce an alcoholic vapor that a person can breathe or inhale.

(2) "Alcohol vaporizing device" does not include an inhaler, a nebulizer, an atomizer, or any other device that is designed and intended by

the manufacturer to dispense either a substance prescribed by a licensed health care provider authorized by law to prescribe the substance or an over-the-counter medication approved under an over-the-counter drug monograph or a new drug application under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., as it existed on January 1, 2009.

(3) "Alcohol vaporizing device" includes an inhaler, a nebulizer, an atomizer, or any other device described in subdivision (d)(2) of this section if the inhaler, nebulizer, or atomizer is used for the purpose of inducing a condition of intoxication through breathing or inhalation.

History. Acts 1969, No. 34, §§ 1-3; A.S.A. 1947, §§ 41-2963 — 41-2965; Acts 2005, No. 1994, § 381; 2009, No. 466, § 1.

Amendments. The 2009 amendment, in the section heading, inserted "possession, selling" and added "Alcohol vaporizing devices prohibited"; added (a)(1)(B) through (E); substituted "It is unlawful for any person to knowingly" for "No person shall" in the introductory language of (a)(1); in (a)(2), substituted "subdivision (a)(1)(A) or subdivision (a)(1)(B)" for "subdivision (a)(1)" and deleted "deemed to be" following "section is"; in (b)(2), substituted "This section does not apply" for "Nothing contained in this section applies" and inserted "purpose" following "medical"; substituted "Upon conviction, a person who violates" for "Any person who violates any provision of" in (c); and added (d).

5-60-123. Obstruction or interference with emergency medical personnel.

(a) It is unlawful for a person to obstruct or interfere with emergency medical services personnel, a rescue technician, or any other emergency medical care provider, whether governmental, private, or volunteer emergency medical personnel, in the performance of his or her rescue mission.

(b)(1) Obstruction or interference with emergency medical personnel by using or threatening to use physical force is a Class A misdemeanor.

(2) Obstruction or interference with emergency medical personnel other than by physical force or threatening physical force is a Class C misdemeanor.

History. Acts 2005, No. 1683, § 1; 2009, No. 689, § 2.

Amendments. The 2009 amendment substituted "emergency medical services personnel" for "an emergency medical technician" in (a).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

5-60-124. Interference with emergency communication in the first degree.

(a) A person commits the offense of interference with emergency communication in the first degree if he or she knowingly displaces, damages, or disables another person's telephone or other communication device with the purpose of defeating the other person's ability to

request with good cause emergency assistance from a law enforcement agency, medical facility, or other government agency or entity that provides emergency assistance.

(b) Interference with emergency communication in the first degree is a Class A misdemeanor.

History. Acts 2007, No. 162, § 1.

5-60-125. Interference with emergency communication in the second degree.

(a) A person commits the offense of interference with emergency communication in the second degree if he or she recklessly prevents, interrupts, disrupts, impedes, or interferes with another person's attempt to request with good cause emergency assistance from a law enforcement agency, medical facility, or other government agency or entity that provides emergency assistance.

(b) Interference with emergency communication in the second degree is a Class B misdemeanor.

History. Acts 2007, No. 162, § 1.

Subchapter 2 — Intent to Defraud a Drug or Alcohol Screening Test

SECTION.
5-60-201. Unlawful activities.

5-60-201. Unlawful activities.

(a)(1)(A) It is unlawful for a person to:

(i) Sell, give away, distribute, or market human or synthetic urine in this state or transport human or synthetic urine into this state with the intent of using the human or synthetic urine to defraud or cause deceitful results in a drug or alcohol screening test;

(ii) Attempt to foil or defeat a drug or alcohol screening test by substituting synthetic urine or substituting or spiking a human urine sample or by advertising urine sample substitution or human urine spiking devices or measures;

(iii) Adulterate a human urine sample or other human bodily fluid sample with the intent to defraud or cause deceitful results in a drug or alcohol screening test;

(iv) Possess adulterants which are intended to be used to adulterate a human urine sample or other human bodily fluid sample for the purpose of defrauding or causing deceitful results in a drug or alcohol screening test; or

(v) Sell or market an adulterant with the intent by the seller or marketer that the product be used to adulterate a human urine sample or other human bodily fluid sample for the purpose of

defrauding or causing deceitful results in a drug or alcohol screening test.

(B) As used in this section, "adulterant" means a substance that is not expected to be in human urine or another human bodily fluid or a substance expected to be present in human urine or another human bodily fluid but that is at a concentration so high that it is not consistent with human urine or another human bodily fluid, including without limitation:

(i) Bleach;
(ii) Chromium;
(iii) Creatinine;
(iv) Detergent;
(v) Glutaraldehyde;
(vi) Glutaraldehyde/squalene;
(vii) Hydrochloric acid;
(viii) Hydroiodic acid;
(ix) Iodine;
(x) Nitrite;
(xi) Peroxidase;
(xii) Potassium dichromate;
(xiii) Potassium nitrite;
(xiv) Pyridinium chlorochromate; and
(xv) Sodium nitrite.

(2) Upon conviction, a person who violates subdivision (a)(1)(A) of this section is guilty of a Class B misdemeanor.

(b) Intent to defraud or cause deceitful results in a drug or alcohol screening test is presumed if:

(1) A heating element or any other device used to thwart a drug screening test accompanies the sale, giving, distribution, or marketing of human or synthetic urine; or

(2) Instructions that provide a method for thwarting a drug screening test accompany the sale, giving, distribution, or marketing of human or synthetic urine.

History. Acts 2003, No. 750, § 1; 2009, No. 640, § 1.

Amendments. The 2009 amendment inserted "human or synthetic" preceding "urine" in three places in (a)(1)(A)(i), (b)(1), and (b)(2); inserted "human" preceding "urine" in (a)(1)(A)(ii) through (a)(1)(A)(v); inserted "human" preceding "bodily fluid" in (a)(1)(A)(ii) through (a)(1)(A)(v); in (a)(1)(B), inserted "As used in this section" and inserted "or another human bodily fluid" in three places; inserted "Upon conviction" in (a)(2); and made related and minor stylistic changes.

CHAPTER 61

ABORTION

SUBCHAPTER.

2. Partial-Birth Abortion Ban Act of 1997.

Subchapter 2 — Partial-Birth Abortion Ban Act of 1997

SECTION.
5-61-201 — 5-61-204. [Repealed.]

Effective Dates. Acts 2009, No. 196, § 3: Feb. 20, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that partial-birth abortion poses serious risks to the health of a female undergoing the procedure; that those risks include, among other things: an increase in a female's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a female to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position and a risk of lacerations and secondary hemorrhaging due to the physician blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-61-201 — 5-61-204. [Repealed.]

Publisher's Notes. This subchapter was repealed by Acts 2009, No. 196, § 2. The subchapter was derived from the following sources:

5-61-201. Acts 1997, No. 984, § 1.
5-61-202. Acts 1997, No. 984, § 2.
5-61-203. Acts 1997, No. 984, § 3.
5-61-204. Acts 1997, No. 984, § 4.

For current law, see the Partial-Birth Abortion Ban Act, § 20-16-1201 et seq.

CHAPTER 62
ANIMALS

SUBCHAPTER.
1. General Provisions.

Subchapter 1 — General Provisions

SECTION.
5-62-101. [Repealed.]
5-62-102. Definitions.
5-62-103. Offense of cruelty to animals.
5-62-104. Offense of aggravated cruelty to a dog, cat, or horse.
5-62-105. Exemptions.
5-62-106. Disposition of animal.
5-62-107. Immunity for reporting cruelty to animals or aggravated cruelty to a dog, cat, or horse.
5-62-108. Arrested persons — Animal possession.
5-62-109. Immunity — Veterinarians.
5-62-110. [Repealed.]
5-62-111. Prevention of cruelty.
5-62-112. [Repealed.]
5-62-113. [Repealed.]

5-62-101. [Repealed.]

Publisher's Notes. This section, concerning cruelty to animals, was repealed by Acts 2009, No. 33, § 2. The section was derived from Acts 1975, No. 280, § 2918; 1983, No. 285, § 1; A.S.A. 1947, § 41-2918; Acts 2001, No. 1826, § 1.

5-62-102. Definitions.

As used in this subchapter:

(1) "Abandon" means to desert, surrender, forsake, or to give up absolutely;

(2) "Animal" means any living vertebrate creature, except human beings and fish;

(3) "Animal control officer" means an officer employed by or under contract with an agency of the state, county, municipality, or other governmental or political subdivision of the state that is responsible for animal control operations in its jurisdiction;

(4)(A) "Animal husbandry practices" means the breeding, raising, production, and management of animals.

(B) "Animal husbandry practices" includes without limitation dehorning, docking, and castration;

(5) "Animal identification" means the use of a microchip, tattoo, an ear tag, an ear notch, branding, or any similar technology to identify the owner of an animal and that is generally accepted for the breed, species, and type of animal being identified;

(6) "Appropriate place of custody" means any of the following within this state and, if practicable, within twenty (20) miles of the residence of the owner or other place owned by the owner:

(A) A nonprofit animal shelter;

(B) An animal pound;

(C) A location owned or managed by a society incorporated for the prevention of cruelty to animals;

(D) A location owned or managed by an agency of the state, county, municipality, or other governmental or political subdivision of the state that is responsible for animal control operations in its jurisdiction;

(E) A location owned or managed by a public or private custodian that provides shelter, care, and necessary medical treatment to an animal; or

(F) The residence or other place owned by the owner of the animal, if approved by written order of a court of competent jurisdiction;

(7) "Competitive activity" means a lawful activity that is generally recognized as having an established schedule of events involving competition of animals or exhibitions of animals;

(8) "Cruel mistreatment" means any act that causes or permits the continuation of unjustifiable pain or suffering;

(9) "Equine" means a horse, pony, mule, donkey, or hinny;

(10) "Equine activity" means:

(A) Equine participation in equine shows, fairs, competitions, performances, or parades that involve any breed of equine and any of the equine disciplines, including without limitation dressage, hunter and jumper horse shows, grand prix jumping, three-day events, combined training, rodeos, pulling, cutting, polo, steeplechasing, endurance trail riding and western games, and hunting;

(B) Teaching and training activities of an equine show or rodeo;

(C) Boarding an equine;

(D) Riding, inspecting, or evaluating an equine owned by another person, whether or not the owner has received some monetary consideration or other thing of value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect, or evaluate the equine; or

(E) Any activity that involves riding or hunting;

(11) "Euthanizing" means humanely killing an animal accomplished by a method that utilizes anesthesia produced by an agent that causes painless loss of consciousness and subsequent death, and administered by a licensed veterinarian or a euthanasia technician licensed by the federal Drug Enforcement Administration and certified by the Department of Health;

(12) "Humanely killing" means causing the death of an animal in a manner intended to limit the pain or suffering of the animal as much as reasonably possible under the circumstances;

(13) "Law enforcement officer" means any public servant vested by law with a duty to maintain public order or to make an arrest for an offense;

(14) "Licensed veterinarian" means a veterinarian licensed to engage in the practice of veterinary medicine in Arkansas in accordance with applicable Arkansas laws;

(15) "Livestock" means a horse, mule, bovine animal, goat, sheep, swine, chicken, duck, or similar animal or fowl commonly raised or used for farm purposes;

(16) "Local law enforcement agency" means the police force of a municipality or the office of the county sheriff;

(17) "Owner" means a person that:

(A) Has a right of property or title in an animal;

(B) Keeps or harbors an animal;

(C) Has an animal in his, her, or its care;

(D) Acts as an animal's custodian; or

(E) Knowingly permits an animal to remain on or about any premises occupied by him or her or it;

(18) "Person" means an individual, company, partnership, limited liability company, joint venture, joint agreement, mutual association or other, corporation, estate, trust, business trust, receiver, trustee, syndicate, or any other private entity;

(19) "Professional pest control activities" means those activities governed by the Arkansas Pesticide Control Act, § 2-16-401 et seq., and the Arkansas Pest Control Law, § 17-37-101 et seq.;

(20) "Rodeo" means an event involving a practice accepted by the Professional Rodeo Cowboys Association on January 1, 2009; and

(21) "Torture" means:

(A) The knowing commission of physical injury to a dog, cat, or horse by the infliction of inhumane treatment or gross physical abuse, causing the dog, cat, or horse intensive or prolonged pain, serious physical injury, or thereby causing death; and

(B) Mutilating, maiming, burning, poisoning, drowning, or starving a dog, cat, or horse.

History. Acts 2009, No. 33, § 3; 2013, No. 1175, § 1.

Amendments. The 2013 amendment added "any of the following within this state and, if practicable, within twenty (20) miles of the residence of the owner or other place owned by the owner" in the introductory language of (6).

5-62-103. Offense of cruelty to animals.

(a) A person commits the offense of cruelty to animals if he or she knowingly:

(1) Subjects any animal to cruel mistreatment;

(2) Kills or injures any animal owned by another person without legal privilege or consent of the owner;

(3) Abandons an animal at a location without providing for the animal's continued care;

(4) Fails to supply an animal in his or her custody with a sufficient quantity of wholesome food and water;

(5) Fails to provide an animal in his or her custody with adequate shelter that is consistent with the breed, species, and type of animal; or

(6) Carries or causes to be carried in or upon any motorized vehicle or boat an animal in a cruel or inhumane manner.

(b) For purposes of this section, each alleged act of the offense of cruelty to animals committed against more than one (1) animal may constitute a separate offense.

(c) Any person who pleads guilty or nolo contendere to or is found guilty of cruelty to animals is guilty of an unclassified misdemeanor and shall be:

(1) Fined no less than one hundred fifty dollars ($150) and no more than one thousand dollars ($1,000);

(2) Either:

(A) Imprisoned for no less than one (1) day and no more than one (1) year in jail; or

(B) Ordered to complete community service; and

(3)(A) Both:

(i) Ordered to complete a psychiatric or psychological evaluation; and

(ii) If determined appropriate, psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(B) The cost of any psychiatric or psychological evaluation, counseling, or treatment may be ordered paid by the person up to the jurisdictional limit of the court.

(d) Any person who pleads guilty or nolo contendere to or is found guilty of the offense of cruelty to animals for a second offense occurring within five (5) years of a previous offense of cruelty to animals or of any other equivalent penal offense of another state or foreign jurisdiction is guilty of an unclassified misdemeanor and shall be:

(1) Fined no less than four hundred dollars ($400) and no more than one thousand dollars ($1,000);

(2) Either:

(A) Imprisoned for no fewer than seven (7) days and no more than one (1) year; or

(B) Ordered to complete no fewer than thirty (30) days of community service; and

(3)(A) Both:

(i) Ordered to receive a psychiatric or psychological evaluation; and

(ii) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(B) The cost of any psychiatric or psychological evaluation, counseling, or treatment may be ordered paid by the person up to the jurisdictional limit of the court.

(e) Any person who pleads guilty or nolo contendere to or is found guilty of the offense of cruelty to animals for a third offense occurring within five (5) years of a previous offense of cruelty to animals or of any other equivalent penal offense of another state or foreign jurisdiction is guilty of an unclassified misdemeanor and shall be:

(1) Fined no less than nine hundred dollars ($900) and no more than one thousand dollars ($1,000);

(2) Either:

(A) Imprisoned for no fewer than ninety (90) days and no more than one (1) year; or

(B) Ordered to complete no fewer than ninety (90) days of community service; and

(3)(A) Both:

(i) Ordered to receive a psychiatric or psychological evaluation; and

(ii) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(B) The cost of any psychiatric or psychological evaluation, counseling, or treatment may be ordered paid by the person up to the jurisdictional limit of the court.

(f)(1) Any person who pleads guilty or nolo contendere to or is found guilty of cruelty to animals for a fourth or subsequent offense occurring within (5) five years of a previous offense of cruelty to animals or of any other equivalent penal offense of another state or foreign jurisdiction is guilty of a Class D felony and shall be:

(A) Ordered to receive a psychiatric or psychological evaluation; and

(B) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(2) The cost of any psychiatric or psychological evaluation, counseling, or treatment may be ordered paid by the person.

(g)(1) For the sole purpose of calculating the number of previous offenses under subsections (d), (e), and (f) of this section, all offenses that are committed against one (1) or more animals and as part of the same criminal episode are a single offense.

(2) As used in this section, "criminal episode" means an act that constitutes the offense of cruelty to animals that is committed by a person against one (1) or more animals within a period of twenty-four (24) hours.

History. Acts 2009, No. 33, § 3; 2011, No. 1120, § 12.

Amendments. The 2011 amendment inserted (e)(3)(B) and redesignated the remaining subdivisions.

RESEARCH REFERENCES

ALR. Challenges to Pre- and Post-Conviction Forfeitures and to Postconviction Restitution Under Animal Cruelty Statutes. 70 A.L.R.6th 329.

5-62-104. Offense of aggravated cruelty to a dog, cat, or horse.

(a) A person commits the offense of aggravated cruelty to a dog, cat, or horse if he or she knowingly tortures any dog, cat, or horse.

(b) A person who pleads guilty or nolo contendere to or is found guilty of aggravated cruelty to a dog, cat, or horse:

(1) Shall be guilty of a Class D felony;

(2) May be ordered to perform up to four hundred (400) hours of community service; and

(3) Both:

(A) Ordered to receive a psychiatric or psychological evaluation; and

(B) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(c) A person who pleads guilty or nolo contendere to or is found guilty of aggravated cruelty to a dog, cat, or horse for a subsequent offense occurring within five (5) years from a previous offense of aggravated cruelty to a dog, cat, or horse or of any other equivalent penal offense of

another state or foreign jurisdiction is guilty of a Class C felony and shall be:

(1) Ordered to receive a psychiatric or psychological evaluation; and

(2) If determined appropriate, ordered to receive psychiatric or psychological counseling or treatment for a length of time prescribed by the court.

(d) The cost of any psychiatric or psychological evaluation, counseling, or treatment ordered under this section shall be paid by the person ordered to receive the psychiatric or psychological evaluation, counseling, or treatment.

(e) For purposes of this section, each alleged act of the offense of aggravated cruelty to a dog, cat, or horse committed against more than one (1) dog, cat, or horse may constitute a separate offense.

(f)(1) For the sole purpose of calculating the number of previous offenses under subsection (b) of this section, all offenses of aggravated cruelty to a dog, cat, or horse that are committed against one (1) or more dogs, cats, or horses, as part of the same criminal episode are a single offense.

(2) As used in this section, "criminal episode" means an act that constitutes the offense of aggravated cruelty to a dog, cat, or horse, committed by a person against one (1) or more dogs, cats, or horses within a period of twenty-four (24) hours.

History. Acts 2009, No. 33, § 3.

5-62-105. Exemptions.

(a) This subchapter does not prohibit any of the following activities:

(1) Reasonably acting to protect a person or a person's property from damage;

(2) Injuring or humanely killing an animal on the property of a person if the person is acting as a reasonable person would act under similar circumstances and if the animal is reasonably believed to constitute a threat of physical injury or damage to any animal under the care or control of the person;

(3) Engaging in practices lawful under the Arkansas Veterinary Medical Practice Act, § 17-101-101 et seq., or engaging in activities by or at the direction of any licensed veterinarian while following accepted standards of practice of the profession, including the euthanizing of an animal;

(4) Rendering emergency care, treatment, or assistance, including humanely killing an animal, that is abandoned, ill, injured, or in distress related to an accident or disaster, or where there appears to be no reasonable probability that the life or usefulness of the animal can be saved, if the person rendering the emergency care, treatment, or assistance is:

(A) Acting in good faith;

(B) Not receiving compensation; and

(C) Acting as a reasonable person would act under similar circumstances;

(5) Performing generally accepted animal husbandry practices;

(6) Performing professional pest control activities in a lawful manner;

(7) Performing generally accepted training for or participating in a rodeo, equine activity, or competitive activity;

(8) Engaging in generally accepted practices of animal identification;

(9) Engaging in the taking of game or fish through hunting, trapping, or fishing, or engaging in any other activity authorized by Arkansas Constitution, Amendment 35, by § 15-41-101 et seq., or by any Arkansas State Game and Fish Commission regulation promulgated under either Arkansas Constitution, Amendment 35, or statute;

(10) Conducting activities undertaken by research and education facilities or institutions that are:

(A) Regulated under the Animal Welfare Act, 7 U.S.C. § 2131 et seq., as in effect on January 1, 2009;

(B) Regulated under the Health Research Extension Act of 1985, Pub. L. No. 99-158; or

(C) Subject to any federal law or regulation governing animal research that is in effect on January 1, 2009; and

(11) Applying generally accepted methods used to train dogs engaged in hunting, field trials, service work, obedience training, or any similar activities authorized by the Arkansas State Game and Fish Commission.

(b) In addition to the exemptions in subsection (a) of this section, this subchapter does not prohibit a person from engaging in or performing conduct that is otherwise permitted under the laws of this state or of the United States, including without limitation agricultural activities, butchering, food processing, marketing, medical activities, zoological activities, or exhibitions.

History. Acts 2009, No. 33, § 3.

A.C.R.C. Notes. Title 15, Chapter 41, referred to in subdivision (a)(9) of this section, includes the following sections: §§ 15-41-101 [repealed], 15-41-102, 15-41-103 [repealed], 15-41-104 [repealed], 15-41-105, 15-41-106 [repealed], 15-41-107 [repealed], 15-41-108 — 15-41-111, 15-41-112 [repealed], 15-41-113 — 15-41-115, 15-41-116 [repealed], 15-41-117 [repealed], 15-41-201 [repealed], 15-41-202 [repealed], 15-41-203, 15-41-204 — 15-41-208 [repealed], 15-41-209, 15-41-210 [repealed], and 15-41-211 [repealed] and the Arkansas Hunting Heritage Protection Act, § 15-41-301 et seq.

5-62-106. Disposition of animal.

(a)(1) Unless otherwise ordered by a court, for purposes of this subchapter, an animal that has been seized by a law enforcement officer or animal control officer under this subchapter shall remain at the appropriate place of custody for a period of at least fifteen (15) consecutive days, including weekends and holidays, after written notice is received by the owner.

(2) The written notice shall:

(A) Be left at the last known address of the owner; and

(B) Contain a description of the animal seized, the date seized, the name and contact information of the law enforcement or animal control officer seizing the animal, the location of the animal, and the reason for the seizure.

(3) If the owner of the animal cannot be determined, a written notice regarding the seizure of the animal shall be conspicuously posted where the animal is seized at the time the seizure occurs if practicable and a notice shall be published in a local newspaper of general circulation in the jurisdiction where the animal was seized at least two (2) times each week for two (2) consecutive weeks, with the first notice published within three (3) days of the seizure, and no less than at least five (5) days before a hearing conducted under this section.

(4)(A) After written notice is received by the owner or published under subdivision (a)(3) of this section, the owner within fifteen (15) business days may petition the district court having jurisdiction where the animal was seized to determine the custody of the animal.

(B) If a petition is not filed by the owner within the time period prescribed by this section, the prosecuting attorney shall file a petition in the district court to divest the owner of ownership of the animal and, after a hearing, the district court may order the animal transferred to an appropriate place of custody, euthanized, or any other disposition the district court deems appropriate.

(b)(1)(A) When an owner files a petition under subsection (a) of this section and the district court determines that the owner shall be divested of custody of the animal, the district court shall order the owner of the animal to post a bond with the district court in an amount the district court determines is sufficient to care for the animal for at least thirty (30) days.

(B) The bond shall not prevent the appropriate place of custody from disposing of the animal at the end of the thirty-day period covered by the bond, unless a person claiming an interest in the animal posts a new bond for an amount determined by the court for an additional thirty-day period.

(2)(A) If a petition has been filed by the owner of an animal or the prosecuting attorney under subsection (a) of this section, a person claiming an interest in an animal seized may prevent disposition of the animal as provided in subsection (a) of this section by posting a bond with the district court in an amount the district court determines is sufficient to care for the animal for at least thirty (30) days.

(B) If a person who claims an interest in the animal has not posted bond in accordance with subdivision (b)(2)(A) of this section, the district court shall determine final disposition of the animal in accordance with reasonable practices for the humane treatment of animals.

(c)(1) A diseased or injured animal:

(A) Seized under this section may be appropriately treated for injury or disease without a court order; and

(B) Is subject to being euthanized without a court order when it is determined by a licensed veterinarian that euthanizing is necessary to prevent the suffering of the animal.

(2)(A) Except as provided in subdivision (c)(1) of this section, an appropriate place of custody shall not alter or modify an animal in any manner, including without limitation the neutering, spaying, or castration of the animal, without:

(i) A written court order that is issued after a petition is filed by the prosecuting attorney requesting alteration or modification and a hearing involving all interested parties as set forth in subsection (a) of this section; or

(ii) The written consent of the owner.

(B) A violation of this subsection is a Class B misdemeanor.

(d)(1) If a person pleads guilty or nolo contendere to or is found guilty of either the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104, and if that person is also the owner of the animal, the court shall divest the person of ownership of the animal, and the court shall either:

(A) Order the animal given to an appropriate place of custody;

(B) Order the animal euthanized if the court decides that the best interests of the animal or that the public health and safety would be best served by euthanizing the animal based on the sworn testimony of a licensed veterinarian or animal control officer; or

(C) Make any other disposition the court deems appropriate.

(2) If a person pleads guilty or nolo contendere to or is found guilty of either the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104, and the person is not the owner of the animal, the court shall order that the animal be returned to the owner, if practicable, or, if not practicable, the court shall either:

(A) Order the animal given to an appropriate place of custody;

(B) Order the animal euthanized if the court decides that the best interests of the animal or that the public health and safety would be best served by euthanizing the animal based on the sworn testimony of a licensed veterinarian or animal control officer; or

(C) Make any other disposition the court deems appropriate.

(e) The court shall order an animal seized under this section returned to the owner if the owner:

(1) Filed a petition under subsection (a) of this section;

(2) Paid all reasonable expenses incurred in caring for the animal; and

(3) Is found not guilty of the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104, or the proceedings against the owner have otherwise terminated.

(f) An owner of an animal that has been seized under this subchapter shall be responsible only for reasonable expenses that were incurred for the care of the animal while the animal was in the appropriate place of custody.

(g) This section does not prohibit the return of an animal to the rightful owner if the rightful owner is located outside the state and the prosecuting attorney has decided not to charge the rightful owner with an offense under this subchapter.

History. Acts 2009, No. 33, § 3; 2013, No. 1160, § 1; 2013, No. 1175, § 2.

Amendments. The 2013 amendment by No. 1160 added (f).

The 2013 amendment by No. 1175 added (g).

RESEARCH REFERENCES

ALR. Challenges to Pre- and Post-Conviction Forfeitures and to Postconviction Restitution Under Animal Cruelty Statutes. 70 A.L.R.6th 329.

5-62-107. Immunity for reporting cruelty to animals or aggravated cruelty to a dog, cat, or horse.

Except as provided in § 5-54-122, a person who in good faith reports a suspected incident of cruelty to animals, § 5-62-103, or aggravated cruelty to a dog, cat, or horse, § 5-62-104, to a local law enforcement agency or to the Department of Arkansas State Police is immune from civil and criminal liability for reporting the incident.

History. Acts 2009, No. 33, § 3.

5-62-108. Arrested persons — Animal possession.

(a) If a law enforcement officer arrests a person in charge of any vehicle drawn by or containing an animal, the law enforcement officer may seize the animal and impound in any lawful manner the vehicle and the contents of the vehicle.

(b)(1) A law enforcement officer that seizes an animal under subsection (a) of this section shall place the animal with an appropriate place of custody.

(2) If an animal is seized under this section, an owner of the animal may petition to regain possession of the animal in the manner proscribed in § 5-62-106.

(c) Any vehicle or contents of the vehicle impounded under subsection (a) of this section shall be returned to the owner as soon as reasonably practicable under the circumstances unless the vehicle or contents of the vehicle are subject to seizure for any other lawful reason.

History. Acts 2009, No. 33, § 3.

5-62-109. Immunity — Veterinarians.

(a) A licensed veterinarian or a person acting at the direction of a licensed veterinarian in Arkansas is:

(1) Held harmless from either criminal or civil liability for any decision made or service rendered in conjunction with this subchapter; and

(2) Immune from suit for his or her part in an investigation of cruelty to animals.

(b) A veterinarian or person acting at the direction of a licensed veterinarian who participates or reports in bad faith or with malice is not protected under this subchapter.

History. Acts 2009, No. 33, § 3.

5-62-110. [Repealed.]

Publisher's Notes. This section, concerning definitions and construction, was repealed by Acts 2009, No. 33, § 4. The section was derived from Acts 1879, No. 47, § 15, p. 54; C. & M. Dig., § 2625; Pope's Dig., § 3312; A.S.A. 1947, § 41-2962.

5-62-111. Prevention of cruelty.

(a) A person may lawfully interfere to prevent the imminent or ongoing perpetration of any offense of cruelty to animals, § 5-62-103, or aggravated cruelty to a dog, cat, or horse, § 5-62-104, upon any animal in his or her presence.

(b) Upon a conviction, a person who knowingly interferes with or obstructs a person acting under subsection (a) of this section is guilty of a Class A misdemeanor.

History. Acts 1879, No. 47, § 10, p. 54; C. & M. Dig., § 2619; Pope's Dig., § 3306; A.S.A. 1947, § 41-2957; Acts 2009, No. 33, § 4.

Amendments. The 2009 amendment rewrote the section.

5-62-112. [Repealed.]

Publisher's Notes. This section, concerning search warrants, was repealed by Acts 2013, No. 1348, § 11. The section was derived from Acts 1879, No. 47, § 14, p. 54; C. M. Dig., § 2624; Pope's Dig., § 3311; A.S.A. 1947, § 41-2961; Acts 2009, No. 33, § 4.

5-62-113. [Repealed.]

Publisher's Notes. This section, concerning authority to make arrests, was repealed by Acts 2013, No. 1348, § 12. The section was derived from Acts 1879, No. 47, § 9, p. 54; C. M. Dig., § 2618; Pope's Dig., § 3305; A.S.A. 1947, § 41-2956; Acts 2009, No. 33, § 4.

5-62-114, 5-62-115. [Repealed.]

Publisher's Notes. These sections, concerning authority to take charge of animals and vehicles of an arrested person and injunction against a society for the prevention of cruelty to animals, were repealed by Acts 2009, No. 33, § 4. The sections were derived from:

5-62-114. Acts 1879, No. 47, § 12, p.

54; C. & M. Dig., § 2621; Pope's Dig., § 3308; A.S.A. 1947, § 41-2959.

5-62-115. Acts 1879, No. 47, § 13, p. 54; C. & M. Dig., § 2623; Pope's Dig., § 3310; A.S.A. 1947, § 41-2960.

5-62-116. Diseased animals — Sale.

(a) Upon conviction, a person who knowingly sells or offers for sale, or uses, or exposes, or causes or procures to be sold or offered for sale, or used, or to be exposed, any horse or other animal having the disease known as "glanders" or "farcy" or any other contagious or infectious disease known to the person to be dangerous to human life, or that is diseased past recovery, is guilty of a Class A misdemeanor.

(b)(1) Upon discovery or knowledge of the animal's condition, any animal having glanders or farcy shall be humanely killed by the owner or person having charge of the animal, or arrangements shall be made to have the animal euthanized.

(2) Upon conviction, an owner or person having charge of the animal and knowingly omitting or refusing to comply with this section is guilty of a Class A misdemeanor.

History. Acts 1879, No. 47, §§ 7, 8, 11, p. 54; C. & M. Dig., §§ 2616, 2617, 2620; Pope's Dig., §§ 3303, 3304, 3307; A.S.A. 1947, §§ 41-2958, 41-3757, 41-3758; Acts 2009, No. 33, § 4.

Amendments. The 2009 amendment deleted "Destruction" from the catchline; in (a), substituted "Upon conviction, a person who knowingly" for "Any person who," and inserted "Class A"; rewrote (b); and deleted (c).

5-62-118, 5-62-119. [Repealed.]

Publisher's Notes. These sections, concerning impounded animals and food and water, and cruelty in transportation, were repealed by Acts 2009, No. 33, § 5. The sections were derived from:

5-62-118. Acts 1879, No. 47, §§ 3, 4, p. 54; C. & M. Dig., §§ 2612, 2613; Pope's Dig., §§ 3299, 3300; A.S.A. 1947, §§ 41-2953, 41-2954; Acts 2007, No. 827, § 51.

5-62-119. Acts 1879, No. 47, § 5, p. 54; C. & M. Dig., § 2614; Pope's Dig., § 3301; A.S.A. 1947, § 41-2955.

5-62-120. Unlawful animal fighting.

(a)(1) A person commits the offense of unlawful animal fighting in the first degree if he or she knowingly:

(A) Promotes, engages in, or is employed at animal fighting;

(B) Receives money for the admission of another person to a place kept for animal fighting; or

(C) Sells, purchases, possesses, or trains an animal for animal fighting.

(2) Unlawful animal fighting in the first degree is a Class D felony.

(b)(1) A person commits the offense of unlawful animal fighting in the second degree if he or she knowingly:

(A) Purchases a ticket of admission to or is present at an animal fight; or

(B) Witnesses an animal fight if it is presented as a public spectacle.

(2) Unlawful animal fighting in the second degree is a Class A misdemeanor.

(c) Upon the arrest of any person for violating a provision of this section, the arresting law enforcement officer or animal control officer may seize and take custody of all animals in the possession of the arrested person.

(d)(1) Upon the conviction of any person for violating a provision of this section, any court of competent jurisdiction may order the forfeiture by the convicted person of all animals the use of which was the basis of the conviction.

(2) Any animal ordered forfeited under a provision of this subsection shall be placed with an appropriate place of custody or an animal control agency.

(e) In addition to the fines, penalties, and forfeitures imposed under this section, the court may require the defendant to make restitution to the state, any of its political subdivisions, or an appropriate place of custody for housing, feeding, or providing medical treatment to an animal used for unlawful animal fighting.

(f) As used in this section, "animal fighting" means fighting between roosters or other birds or between dogs, bears, or other animals.

History. Acts 1981, No. 862, § 1; A.S.A. 1947, § 41-2918.1; Acts 1987, No. 26, § 1; 1989, No. 528, § 1; 2009, No. 33, § 6.

Amendments. The 2009 amendment substituted "animal" for "dog" or variant throughout the section; substituted "with an appropriate place of custody" for "in the custody of a society which is incorporated for the prevention of cruelty to animals" in (d)(2) and (e); added (f); and made related and minor stylistic changes.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of Criminal Statutes and Ordinances to Prosecution for Dogfighting. 68 A.L.R.6th 115.

Validity, Construction, and Application of Statutes and Ordinances to Prosecution for Cockfighting. 69 A.L.R.6th 207.

5-62-122. Permitting livestock to run at large.

(a) A person commits the offense of permitting livestock to run at large if being the owner or person charged with the custody and care of livestock he or she knowingly permits the livestock to run at large.

(b)(1) Except as provided in subdivision (b)(2) of this section, permitting livestock to run at large is a violation and upon conviction a person may be subject to a fine not to exceed one hundred dollars ($100).

(2) Any person who knowingly allows any hog to run at large is guilty of a violation and upon conviction is subject to a fine not to exceed five hundred dollars ($500).

History. Acts 1975, No. 280, § 2919; A.S.A. 1947, § 41-2919; Acts 1999, No. 457, § 4; 2005, No. 1994, § 183; 2009, No. 33, § 7.

Amendments. The 2009 amendment deleted (b) and redesignated the remaining subsections accordingly; and in (b), updated an internal reference in (b)(1) and inserted "knowingly" in (b)(2).

5-62-123. [Repealed.]

Publisher's Notes. This section, concerning larceny of animals including carcasses and flesh, was repealed by Acts 2013, No. 1348, § 13. The section was derived from Init. Meas. 1936, No. 3, § 21, Acts 1937, p. 1384; Pope's Dig., § 3850; A.S.A. 1947, § 43-2156.

5-62-125. Unlawful dog attack.

(a) A person commits the offense of unlawful dog attack if:

(1) The person owns a dog that the person knows or has reason to know has a propensity to attack, cause injury, or endanger the safety of other persons without provocation;

(2) The person negligently allows the dog to attack another person; and

(3) The attack causes the death of or serious physical injury to the person attacked.

(b) The offense of unlawful dog attack is a Class A misdemeanor.

(c) In addition to any penalty imposed under this section, the court or jury may require the defendant to pay restitution under § 5-4-205 for any medical bills of the person attacked for injuries caused by the attack.

History. Acts 2007, No. 258, § 1.

5-62-126. Acts of God — Emergency conditions.

An owner of an animal or person in control of an animal is not guilty of either the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104, if the owner of the animal or the person in control of the animal was reasonably precluded as the result of an act of God or emergency conditions from engaging in an act or omission that might prevent an allegation of the offense of cruelty to animals, § 5-62-103, or the offense of aggravated cruelty to a dog, cat, or horse, § 5-62-104.

History. Acts 2009, No. 33, § 8.

5-62-127. Removal of an animal's transmittal device.

(a) A person commits removal of an animal's transmittal device if he or she knowingly:

(1) Removes a transmittal device from a dog used in hunting or a raptor used in falconry without permission of the owner; and

(2) With the purpose to prevent or hinder the owner from locating the dog used in hunting or raptor used in falconry.

(b) Removal of an animal's transmittal device is a Class C misdemeanor.

(c)(1) Upon a finding of guilt, the court shall order that the defendant pay as restitution the actual value of any dog used in hunting or raptor used in falconry lost or killed as a result of the removal of the animal's transmittal device.

(2) The court also may order restitution to the owner for any lost breeding revenues.

History. Acts 2013, No. 1094, § 1.

CHAPTER 63

BUSINESS MISCONDUCT

Subchapter 2 — Offenses Generally

5-63-201. Tickets to school athletic events or music entertainment events — Sale in excess of regular price.

CASE NOTES

In General.

This section applies to an exclusive agent who sells tickets that include in the price of the ticket additional fees, and the plain and ordinary meaning of "box office" is a booth, as in a theater or stadium, where tickets are sold. It is applicable to exclusive agents of a public facility who sell music entertainment tickets that include in the price of the ticket additional fees, resulting in the price of the ticket being more than the face value and advertised price of the ticket, unless those fees are a reasonable charge for handling or credit card use. McMillan v. Live Nation Entm't, Inc., 2012 Ark. 166, — S.W.3d — (2012).

CHAPTER 64

CONTROLLED SUBSTANCES

SUBCHAPTER.

Subchapter 1 — Uniform Controlled Substances Act — Definitions

SECTION.

5-64-101. Definitions.

As used in this chapter:

(1) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by:

(A) A practitioner; or

(B) The patient or research subject at the direction and in the presence of the practitioner;

(2)(A) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser.

(B) "Agent" does not include a common or contract carrier, public warehouseman, or employee of the common or contract carrier or warehouseman;

(3)(A) "Anabolic steroid" means any drug or hormonal substance, chemically and pharmacologically related to testosterone, other than estrogens, progestin, and corticosteroid that promotes muscle growth.

(B)(i) "Anabolic steroid" does not include an anabolic steroid that is expressly intended for administration through an implant to cattle or another nonhuman species and that has been approved by the Director of the Department of Health for such administration.

(ii) If any person prescribes, dispenses, or distributes a steroid described in subdivision (3)(B)(i) of this section for human use, the person is considered to have prescribed, dispensed, or distributed an anabolic steroid within the meaning of this subdivision (3);

(4) [Repealed.]

(5) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I through VI;

(6)(A) "Counterfeit substance" means a noncontrolled substance, that by overall dosage unit appearance including color, shape, size, markings, packaging, labeling, and overall appearance or upon the basis of representations made to the recipient, purports to be a controlled substance or to have the physical or psychological effect associated with a controlled substance.

(B) In determining whether a substance is a "counterfeit substance", the following factors shall be utilized and a finding of any two (2) of these factors constitutes prima facie evidence that the substance is a "counterfeit substance":

(i) A statement made by an owner or by anyone else in control of the substance concerning the nature of the substance, its use, or effect;

(ii) The physical appearance of the finished product containing the noncontrolled substance is substantially the same as that of a specific controlled substance;

(iii) The noncontrolled substance is unpackaged or is packaged in a manner normally used for the illegal delivery of a controlled substance;

(iv) The noncontrolled substance is not labeled in accordance with 21 U.S.C. § 352 or 21 U.S.C. § 353;

(v) The person delivering, attempting to deliver, or causing delivery of the noncontrolled substance states or represents to the recipient that the noncontrolled substance may be resold at a price that substantially exceeds the value of the substance;

(vi) An evasive tactic or action utilized by the owner or person in control of the substance to avoid detection by a law enforcement authority; or

(vii) A prior conviction, if any, of an owner, or anyone in control of the object under a state or federal law related to a controlled substance or fraud;

(7) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance in exchange for money or anything of value, whether or not there is an agency relationship;

(8) [Repealed.]

(9) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the controlled substance for that delivery;

(10) "Dispenser" means a practitioner who dispenses;

(11) "Distribute" means to deliver other than by administering or dispensing a controlled substance;

(12) "Distributor" means a person who distributes;

(13)(A) "Drug" means a substance:

(i) Recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them;

(ii) Intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(iii) Other than food intended to affect the structure or any function of the body of humans or animals; and

(iv) Intended for use as a component of any article specified in subdivisions (13)(A)(i), (ii), or (iii) of this section.

(B) "Drug" does not include a device or its components, parts, or accessories;

(14)(A) "Drug paraphernalia" means any equipment, product, and material of any kind that are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this chapter.

(B) "Drug paraphernalia" includes, but is not limited to:

(i) A kit used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting any species of plant

that is a controlled substance or from which a controlled substance can be derived;

(ii) A kit used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing a controlled substance;

(iii) An isomerization device used, intended for use, or designed for use in increasing the potency of any species of plant that is a controlled substance;

(iv) Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of a controlled substance;

(v) A scale or balance used, intended for use, or designed for use in weighing or measuring a controlled substance;

(vi) A diluent or adulterant, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose used, intended for use, or designed for use in cutting a controlled substance;

(vii) A separation gin or sifter used, intended for use, or designed for use in removing a twig or seed from, or in otherwise cleaning or refining, marijuana;

(viii) A blender, bowl, container, spoon, or mixing device used, intended for use, or designed for use in compounding a controlled substance;

(ix) A capsule, balloon, envelope, or other container used, intended for use, or designed for use in packaging a small quantity of a controlled substance;

(x) A container or other object used, intended for use, or designed for use in storing or concealing a controlled substance;

(xi) A hypodermic syringe, needle, or other object used, intended for use, or designed for use in parenterally injecting a controlled substance into the human body; and

(xii) An object used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing a controlled substance into the human body, such as:

(a) A metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;

(b) A water pipe;

(c) A carburetion tube or device;

(d) A smoking or carburetion mask;

(e) A roach clip, meaning an object used to hold burning material, such as a marijuana cigarette that has become too small or too short to be held in the hand;

(f) A miniature cocaine spoon or cocaine vial;

(g) A chamber pipe;

(h) A carburetor pipe;

(i) An electric pipe;

(j) An air-driven pipe;

(k) A chillum;

(l) A bong;

(m) An ice pipe or chiller; and

(n) An aluminum foil boat.

(C) In determining whether an object is "drug paraphernalia", a court or other authority shall consider, in addition to any other logically relevant factor, the following:

(i) A statement by an owner or by anyone in control of the object concerning its use;

(ii) A prior conviction, if any, of an owner or of anyone in control of the object under any state or federal law relating to any controlled substance;

(iii) The proximity of the object in time and space to a direct violation of this chapter;

(iv) The proximity of the object to a controlled substance;

(v) The existence of any residue of a controlled substance on the object;

(vi)*(a)* Direct or circumstantial evidence of the intent of an owner or of anyone in control of the object to deliver it to a person whom he or she knows, or should reasonably know, intends to use the object to facilitate a violation of this chapter.

(b) The innocence of an owner or of anyone in control of the object as to a direct violation of this chapter does not prevent a finding that the object is intended for use or designed for use as "drug paraphernalia";

(vii) An oral or written instruction provided with the object concerning its use;

(viii) Descriptive materials accompanying the object that explain or depict its use;

(ix) National and local advertising concerning the object's use;

(x) The manner in which the object is displayed for sale;

(xi) Whether the owner or anyone in control of the object is a legitimate supplier of a like or related item to the community, such as a licensed distributor or dealer of a tobacco product;

(xii) Direct or circumstantial evidence of the ratio of sales of the objects to the total sales of the business enterprise;

(xiii) The existence and scope of legitimate uses for the object in the community; and

(xiv) Expert testimony concerning the object's use;

(15) "Immediate precursor" means a substance that the director has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and that is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture;

(16)(A) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly by extraction from a substance of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis.

(B) "Manufacture" includes any packaging or repackaging of a controlled substance or labeling or relabeling of a controlled substance's container.

(C) However, "manufacture" does not include the preparation or compounding of a controlled substance by an individual for his or her own use or the preparation, compounding, packaging, or labeling of a controlled substance:

(i) By a practitioner as an incident to his or her administering or dispensing of a controlled substance in the course of his or her professional practice; or

(ii) By a practitioner or by his or her authorized agent under his or her supervision for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale;

(17)(A) "Marijuana" means:

(i) Any part and any variety or species, or both, of the Cannabis plant that contains THC (Tetrahydrocannabinol) whether growing or not;

(ii) The seeds of the plant;

(iii) The resin extracted from any part of the plant; and

(iv) Every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin.

(B) "Marijuana" does not include:

(i) The mature stalks of the plant;

(ii) Fiber produced from the stalks;

(iii) Oil or cake made from the seeds of the plant;

(iv) Any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks except the resin extracted from the mature stalks;

(v) Fiber, oil, or cake; or

(vi) The sterilized seed of the plant that is incapable of germination;

(18)(A)(i) "Narcotic drug" means any drug that is defined as a narcotic drug by order of the director.

(ii) In the formulation of a definition of "narcotic drug", the director shall:

(a) Include any drug that he or she finds is narcotic in character and by reason of being narcotic is dangerous to the public health or is promotive of addiction-forming or addiction-sustaining results upon the user that threaten harm to the public health, safety, or morals; and

(b) Take into consideration the provisions of the federal narcotic laws as they exist from time to time and shall amend the definitions so as to keep them in harmony with the definitions prescribed by the federal narcotic laws, so far as is possible under the standards established in this subdivision (18) and under the policy of this chapter.

(B) "Narcotic drug" also means any of the following, whether produced directly or indirectly by extraction from a substance of

vegetable origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i)*(a)* Opium, opiates, a derivative of opium or opiates, including their isomers, esters, and ethers whenever the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation.

(b) "Narcotic drug" does not include an isoquinoline alkaloid of opium;

(ii) Poppy straw and concentrate of poppy straw;

(iii) Coca leaves, except coca leaves and extracts of coca leaves from which cocaines, ecgonine, and derivatives of ecgonine or their salts have been removed;

(iv) Cocaine, its salts, optical and geometric isomers, and salts of isomers;

(v) Ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(vi) Any compound, mixture, or preparation that contains any quantity of any substance referred to in subdivisions (18)(B)(i)-(v) of this section;

(19) "Noncontrolled substance" means any liquid, substance, or material not listed in Schedules I through VI of the Schedules of Controlled Substances promulgated by the director;

(20) "Person" means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity;

(21) "Practitioner" means:

(A) A physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in this state; and

(B) A pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research in this state;

(22) "Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance;

(23) "State" when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legal authority of the United States of America; and

(24) "Ultimate user" means a person who lawfully possesses a controlled substance for:

(A) The person's own use;

(B) The use of a member of the person's household; or

(C) Administering to an animal owned by the person or by a member of his or her household.

History. Acts 1971, No. 590, Art. 1, § 1; 1975, No. 243, § 1; 1975, No. 305, § 1; 1979, No. 898, §§ 1, 2; 1981, No. 78, § 1; 1981, No. 116, § 1; 1983, No. 787, §§ 1, 2; A.S.A. 1947, § 82-2601; Acts 1987, No. 42, § 2; 1991, No. 570, § 1; 1995, No. 1296, § 7; 2005, No. 1994, § 301; 2007, No. 199, § 1; 2007, No. 827, §§ 52–55.

CASE NOTES

Analysis

Deliver or Delivery.
Drug Paraphernalia.
Evidence.
Manufacture and Production.

Deliver or Delivery.

Where both a detective and a confidential informant testified as to the details of a controlled drug buy, the evidence showed that the informant was given $250 in marked money, fitted with an audio device, sent to an apartment where he met defendant, and left the apartment with a baggie containing 1.7794 grams of methamphetamine which he gave to the detective. There was substantial evidence of "delivery" within the meaning of subdivision (7) of this section to support defendant's conviction for delivery of methamphetamine in violation of § 5-64-401; the district court did not err by denying defendant's motion for a directed verdict. Phavixay v. State, 2009 Ark. 452, 352 S.W.3d 311 (2009).

Appellant's conviction for delivery of methamphetamine was affirmed because the jury was properly instructed that the witness's testimony must be corroborated and an officer and the witness both testified that the crime of delivery of methamphetamine occurred. Hall v. State, 2010 Ark. App. 717, — S.W.3d — (2010).

Drug Paraphernalia.

Trial court properly admitted evidence of defendant's prior crimes because they fell within the exception to Ark. R. Evid. 404(b) in that they were independently relevant as proof of knowledge and intent to commit an offense; further, in determining whether an object is drug paraphernalia, courts are directed to consider prior convictions and expert testimony concerning its use. Cluck v. State, 365 Ark. 166, 226 S.W.3d 780 (2006).

Motion to dismiss was properly denied in a case involving possession with intent to use drug paraphernalia because a crack pipe constituted paraphernalia under § 5-64-101(14)(C); further, there was sufficient evidence of intent where defendant admitted the pipe was his, cocaine residue was found on the pipe, and defendant admitted to using it to smoke cocaine in the past. White v. State, 98 Ark. App. 366, 255 S.W.3d 881 (2007).

Sufficient evidence supported a finding that defendant possessed "drug paraphernalia" within the meaning of subdivision (14)(A) of this section, with the intent to manufacture methamphetamine because the jury could choose to believe that he knew the iodine he possessed was going to be used to make methamphetamine. Ashley v. State, 2012 Ark. App. 131, — S.W.3d — (2012).

Evidence.

Based on the evidence indicating defendant's proximity to the manufacturing paraphernalia, the jury could reasonably infer that she had joint possession and control of the contraband; it was undisputed that defendant had been occupying the residence for at least two weeks and she was present in the residence when methamphetamine was being manufactured and that she knew methamphetamine was being manufactured. Holt v. State, 2009 Ark. 482, 348 S.W.3d 562 (2009).

Trial court clearly did not err in denying the motion for directed verdict or its renewal, because the evidence was sufficient to convict defendant of possession of a counterfeit controlled substance, when the soap substance was packaged in a quantity and shape that had all the outward indications of appearing to be crack cocaine, and defendant stated in response to the officer's query that he thought he was getting cocaine. Caldwell v. State, 2009 Ark. App. 526, 334 S.W.3d 82 (2009).

Manufacture and Production.

Evidence was sufficient to sustain a conviction for manufacturing methamphetamine where multiple ingredients and devices used in methamphetamine production were found together with the

by-products of such production in defendant's van, as well as actual methamphetamine. Saul v. State, 365 Ark. 77, 225 S.W.3d 373 (2006).

Defense counsel was not ineffective for not objecting that defendants' convictions violated double jeopardy under § 5-1-110(b) because possession of drug paraphernalia with intent to manufacture methamphetamine was not a lesser-included offense of manufacturing methamphetamine, in violation of subsection (m) of this section. Myers v. State, 2012 Ark. 143, — S.W.3d — (2012).

Cited: Benjamin v. State, 102 Ark. App. 309, 285 S.W.3d 264 (2008); Morgan v. State, 2009 Ark. 257, 308 S.W.3d 147 (2009).

Subchapter 2 — Uniform Controlled Substances Act — Designation of Controlled Substances

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Effective Dates. Acts 2011, No. 751, § 3: Mar. 28, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that new substances that need immediate scheduling are becoming more prevalent; and that this act is immediately necessary because these new substances pose a risk to the public. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-64-201. Director's duties.

(a)(1)(A)(i) The Director of the Department of Health shall administer this chapter and may add a substance to or delete or reschedule any substance enumerated in a schedule under the procedures of the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(ii) The director may promulgate without action or approval of the State Board of Health an emergency rule under the procedures of the Arkansas Administrative Procedure Act, § 25-15-201 et seq., that adds a substance to or deletes a substance from a schedule or reschedules a substance.

(iii) If the director adds, deletes, or reschedules a substance through an emergency rule under the procedures of the Arkansas Administrative Procedure Act, § 25-15-201 et seq., the emergency rule may be effective for no longer than one hundred eighty (180) days.

(B) However, the director shall not delete any substance from a schedule in effect on July 20, 1979, without prior approval by the Legislative Council.

(2) In making a determination regarding a substance, the director shall consider the following:

(A) The actual or relative potential for abuse;

(B) The scientific evidence of its pharmacological effect, if known;

(C) The state of current scientific knowledge regarding the substance;

(D) The history and current pattern of abuse;

(E) The scope, duration, and significance of abuse;

(F) The risk to public health;

(G) The potential of the substance to produce psychic or physiological dependence liability; and

(H) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

(b) After considering the factors enumerated in subsection (a) of this section, the director shall make findings with respect to the factors and issue a rule controlling the substance if he or she finds the substance has a potential for abuse.

(c) If the director designates a substance as an immediate precursor, a substance that is a precursor of the controlled precursor is not subject to control solely because it is a precursor of the controlled precursor.

(d)(1) If any substance is designated as a controlled substance under federal law and notice of the designation is given to the director, the director shall similarly control the substance under this chapter after the expiration of thirty (30) days from publication in the Federal Register of a final order designating a substance as a controlled substance unless within that thirty-day period the director objects to inclusion.

(2)(A) If the director objects to inclusion, the director shall publish the reasons for objection and afford any interested party an opportunity to be heard.

(B) At the conclusion of the hearing, the director shall publish his or her decision.

(C) Any person aggrieved by a decision of the director is entitled to judicial review in the Pulaski County Circuit Court.

(3) Upon publication of objection to inclusion under this chapter by the director, control under this chapter is stayed until the director publishes his or her decision or, if judicial review is sought, the inclusion is stayed until adjudication of the judicial review.

(e) Authority to control under this section does not extend to distilled spirits, wine, malt beverages, or tobacco.

(f) The director shall schedule gamma-hydroxybutyrate and its known precursors and analogs in a manner consistent with the procedures outlined in this section.

History. Acts 1971, No. 590, Art. 2, § 1; 1973, No. 186, § 1; 1979, No. 898, § 3; A.S.A. 1947, § 82-2602; Acts 2001, No. 320, § 2; 2005, No. 1994, § 302; 2011, No. 587, § 1.

Amendments. The 2011 amendment substituted "Department of Health" for "Division of Health of the Department of Health and Human Services" in (a)(1)(A)(i); and added (a)(1)(A)(ii) and (iii).

CASE NOTES

Cited: Benjamin v. State, 102 Ark. App. 309, 285 S.W.3d 264 (2008).

5-64-204. Substances in Schedule I.

(a) In addition to any substance placed in Schedule I by the Director of the Department of Health under § 5-64-203, any material, compound, mixture, or preparation, whether produced directly or indirectly from a substance of vegetable origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, that contains any quantity of the following substances, or that contains any of the following substances' analogs, salts, isomers, and salts of isomers when the existence of the analogs, salts, isomers, and salts of isomers is possible within the specific chemical designation, with the following chemical structure is included in Schedule I:

(1) 4-Methylmethcathinone (Mephedrone);

(2) Methylenedioxypyrovalerone (MDPV);

(3) 3,4-Methylenedioxy-N-methylcathinone (Methylone);

(4) 4-Methoxymethcathinone;

(5) 3-Fluoromethcathinone;

(6) 4-Fluoromethcathinone; or

(7) A compound, unless listed in another schedule or a legend drug, that is structurally derived from 2-Amino-1-phenyl-1-propanone by modification or by substitution:

(A) In the phenyl ring to any extent with alkyl, alkoxy, alkylenedioxy, haloalkyl or halide substituents, whether or not further substituted in the phenyl ring by one (1) or more other univalent substituents;

(B) At the 3-position with an alkyl substituent; or

(C) At the nitrogen atom with alkyl or dialkyl groups, or by inclusion of the nitrogen atom in a cyclic structure.

(b) The Director of the Department of Health shall not delete a controlled substance listed in this section from Schedule I.

History. Acts 2011, No. 751, § 1.

Publisher's Notes. The Uniform Controlled Substance Act (U.L.A.), § 204, lists the controlled substances included in Schedule I. Schedule I was originally adopted in Arkansas but was subsequently repealed and is now governed by administrative regulation. It is revised and republished annually by the Director of the Division of Health of the Department of Health and Human Services or his or her authorized agent. For a copy of the most recent rescheduling of controlled substances, contact the Division of Health of the Department of Health and Human Services.

5-64-210. Substances in Schedule IV.

Schedule IV includes any material, compound, mixture, or preparation that contains any quantity of tramadol or that contains any of tramadol's salts, isomers, or salts of isomers.

History. Acts 2007, No. 558, § 1; No. 585, § 1.

5-64-212. Substances in Schedule V.

(a) An ephedrine combination product, pseudoephedrine, and phenylpropanolamine, as defined in § 5-64-1105, are designated Schedule V controlled substances in addition to the drugs and other substances listed in Schedule V of the List of Controlled Substances for the State of Arkansas promulgated by the Director of the Department of Health.

(b) The Schedule V classification does not apply to:

(1) An exempt product described in § 5-64-1103(b)(1); or

(2) Any ephedrine or pseudoephedrine in liquid, liquid capsule, or liquid gel capsule form described in § 5-64-1103(b)(2).

(c) The director may reschedule a product described in subdivision (b)(1) or (b)(2) of this section if it is determined that the conversion of the active ingredient in the product into methamphetamine or its salts or precursors is feasible.

(d) A wholesale distributor with exclusive rights to distribute pseudoephedrine to only licensed pharmacies is exempt from Schedule V requirements for the storage and distribution of pseudoephedrine.

History. Acts 2005, No. 256, § 2; 2011, No. 588, § 1.

Amendments. The 2011 amendment deleted (b)(3).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

5-64-214. Criteria for Schedule VI.

The Director of the Department of Health shall place a substance in Schedule VI if he or she finds that:

(1) The substance is not currently accepted for medical use in treatment in the United States;

(2) That there is lack of accepted safety for use of the drug or other substance even under direct medical supervision;

(3) That the substance has relatively high psychological or physiological dependence liability, or both; and

(4) That use of the substance presents a definite risk to public health.

History. Acts 1971, No. 590, Art. 2, § 14, as added by Acts 1973, No. 186, § 1; 1979, No. 898, § 12; A.S.A. 1947, § 82-2614.1; Acts 2007, No. 827, § 56.

5-64-215. Substances in Schedule VI.

(a) In addition to any substance placed in Schedule VI by the Director of the Department of Health under § 5-64-214, any material, compound, mixture, or preparation, whether produced directly or indirectly from a substance of vegetable origin or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, that contains any quantity of the following substances, or that contains any of their salts, isomers, and salts of isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation, is included in Schedule VI:

(1) Marijuana;

(2) Tetrahydrocannabinols;

(3) A synthetic equivalent of:

(A) The substance contained in the Cannabis plant; or

(B) The substance contained in the resinous extractives of the genus Cannabis;

(4) Salvia divinorum or Salvinorin A, which includes all parts of the plant presently classified botanically as Salvia divinorum, whether growing or not, the seeds of the plant, any extract from any part of the plant, and every compound, manufacture, derivative, mixture, or preparation of the plant, its seeds, or its extracts, including salts, isomers, and salts of isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation;

(5) Synthetic substances, derivatives, or their isomers in the chemical structural classes described below in subdivisions (a)(5)(A)-(J) of this section and also specific unclassified substances in subdivision (a)(5)(K) of this section. Compounds of the structures described in this subdivision (a)(5), regardless of numerical designation of atomic positions, are included in this subdivision (a)(5). The synthetic substances, derivatives, or their isomers included in this subdivision (a)(5) are:

(A)(i) Tetrahydrocannabinols, including without limitation the following:

(a) Delta-1 cis or trans tetrahydrocannabinol, and its optical isomers;

(b) Delta-6 cis or trans tetrahydrocannabinol, and its optical isomers; and

(c) Delta-3.4 cis or trans tetrahydrocannabinol, and its optical isomers.

(ii) Dronabinol in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the United States Food and Drug Administration is not a tetrahydrocannabinol under this subdivision (a)(5)(A);

(B) Naphthoylindoles, or any compound structurally derived from 3-(1-naphthoyl)indole or 1H-indol-3-yl-(1-naphthyl)methane by substitution at the nitrogen atom of the indole ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl)ethyl group, whether or not further

substituted in the indole ring to any extent and whether or not substituted in the naphthyl ring to any extent, including without limitation the following:

(i) JWH-007, or 1-pentyl-2-methyl-3-(1-naphthoyl)indole;

(ii) JWH-015, or 1-Propyl-2-methyl-3-(1-naphthoyl)indole;

(iii) JWH-018, or 1-Propyl-3-(1-naphthoyl)indole;

(iv) JWH-019, or 1-Hexyl-3-(1-naphthoyl)indole;

(v) JWH-073, or 1-Butyl-3-(1-naphthoyl)indole;

(vi) JWH-081, or 1-Pentyl-3-(4-methoxy-1-naphthoyl)indole;

(vii) JWH-098, or 1-pentyl-2-methyl-3-(4-methoxy-1-naphthoyl)indole;

(viii) JWH-122, or 1-Pentyl-3-(4-methyl-1-naphthoyl)indole;

(ix) JWH-164, or 1-pentyl-3-(7-methoxy-1-naphthoyl)indole;

(x) JWH-200, or 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl)indole;

(xi) JWH-210, or 1-Pentyl-3-(4-ethyl-1-naphthoyl)indole;

(xii) JWH-398, or 1-Pentyl-3-(4-chloro-1-naphthoyl)indole;

(xiii) AM-2201, or 1-(5-fluoropentyl)-3-(1-naphthoyl)indole;

(xiv) MAM2201, or (1-(5-fluoropentyl)-1H-indol-3-yl)(4-methyl-1-naphthalenyl)-methanone; and

(xv) EAM2201, or (1-(5-fluoropentyl)-1H-indol-3-yl)(4-ethyl-1-naphthalenyl)-methanone;

(C) Naphthylmethylindoles, or any compound structurally derived from an H-indol-3-yl-(1-naphthyl) methane by substitution at the nitrogen atom of the indole ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the naphthyl ring to any extent, including without limitation the following:

(i) JWH-175, or 1-Pentyl-1H-indol-3-yl-(1-naphthyl)methane; and

(ii) JWH-184, or 1-Pentyl-1H-3-yl-(4-methyl-1-naphthyl)methane;

(D) Naphthoylpyrroles, or any compound structurally derived from 3-(1-naphthoyl)pyrrole by substitution at the nitrogen atom of the pyrrole ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the pyrrole ring to any extent and whether or not substituted in the naphthyl ring to any extent, including without limitation JWH-307, or (5-(2-fluorophenyl)-1-pentylpyrrol-3-yl)-naphthalen-1-ylmethanone;

(E) Naphthylmethylindenes, or any compound structurally derived from 1-(1-napthylmethyl)indene with substitution at the 3-position of the indene ring by an alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not further substituted in the indene ring to any extent and whether or not substituted in the naphthyl ring to any extent, including without limitation JWH-176, or E-1-[1-(1-Naphthalenylmethylene)-1H-inden-3-yl]pentane;

(F) Phenylacetylindoles, or any compound structurally derived from 3-phenylacetylindole by substitution at the nitrogen atom of the

indole ring with alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl-)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the phenyl ring to any extent, including without limitation the following:

(i) JWH-201, or 2-(4-methoxyphenyl)-1-(1-pentylindol-3-yl)ethanone;

(ii) JWH-203, or 1-Pentyl-3-(2-chlorophenylacetyl)indole;

(iii) JWH-250, or 1-Pentyl-3-(2-methoxyphenylacetyl)indole;

(iv) JWH-251, or 1-Pentyl-3-(2-methylphenylacetyl)indole; and

(v) RCS-8, or 1-(2-cyclohexylethyl)-3-(2-methoxyphenylacetyl)indole;

(G) Cyclohexylphenols, or any compound structurally derived from 2-(3-hydroxycyclohexyl)phenol by substitution at the 5-position of the phenolic ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl, or 2-(4-morpholinyl)ethyl group, whether or not substituted in the cyclohexyl ring to any extent, including without limitation the following:

(i) CP 47,497 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol;

(ii) Cannabicyclohexanol or CP 47,497 C8 homologue, or 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol; and

(iii) CP 55,940, or 5-(1,1-dimethylheptyl)-2-[(1R,2R)-5-hydroxy-2-(3-hydroxypropyl)cyclohexyl]-phenol;

(H) Benzoylindoles, or any compound structurally derived from a 3-(benzoyl)indole structure with substitution at the nitrogen atom of the indole ring by alkyl, haloalkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl-)ethyl group, whether or not further substituted in the indole ring to any extent and whether or not substituted in the phenyl ring to any extent, including without limitation the following:

(i) AM-694, or 1-(5-fluoropentyl)-3-(2-iodobenzoyl)indole;

(ii) RCS-4, or 1-Pentyl-3-(4-methoxybenzoyl)indole;

(iii) WIN-48,098 or Pravadoline, or (4-Methoxyphenyl)-[2-methyl-1-(2-(4-morpholinyl)ethyl)indol-3-y]methanone;

(iv) AM-2233, or 1-[(N-methylpiperidin-2-yl)methyl]-3-(2-iodobenzoyl)indole; and

(v) RCS-4 (C4 homologue) or (4-methoxyphenyl)(1-butyl-1H-indol-3-yl)-methanone;

(I) Adamantoylindoles, or Adamantoylindazoles, including Adamantyl Carboxamide Indoles and Adamantyl Carboxamide Indazoles, or any compound structurally derived from 3-(1-adamantoyl) indole, 3-(1-adamantoyl) indazole, or 3-(2-adamantoyl)indole by substitution at a nitrogen atom of the indole or indazole ring with alkyl, haloalkyl, alkenyl, cyanoalkyl, hydroxyalkyl, cycloalkylmethyl, cycloalkylethyl, 1-(N-methyl-2-piperidinyl)methyl or 2-(4-morpholinyl-)ethyl, whether or not further substituted in the indole or indazole ring to any extent and whether or not substituted in the adamantyl ring to any extent, including without limitation the following:

(i) AM-1248, or 1-adamantyl-[1-[(1-methylpiperidin-2-yl)methyl-]indol-3-yl]methanone;

(ii) AB-001, or 1-adamantyl-(1-pentylindol-3-yl)methanone;

(iii) 2NE1, or 1-pentyl-3-(1-adamantylamido)indole;

(iv) JWH-018 adamantyl carboxamide, or 1-pentyl-N-tricyclo[3.3.1.13,7]dec-1-yl-1H-indole-3-carboxamide;

(v) AKB-48, or N-(1-adamantyl)-pentyl-1H-indazole-3-carboxamide;

(vi) 5F-AKB-48, or N-((3s,5s,7s)-adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide; and

(vii) STS-135, or N-(1-adamantyl)-1-(5-fluoropentyl)indole-3-carboxamide;

(J) Tetramethylcyclopropylcarbonylindoles or any compound structurally derived from 3-(2,2,3,3-tetramethylcyclopropylcarbonyl) indole by substitution at the nitrogen atom of the indole ring with alkyl, haloalkyl, alkenyl, cyanoalkyl, hydroxyalkyl, cycloalkylmethyl, cycloalkylethyl, (N-methylpiperidin-2-yl)methyl or 2-(4-morpholinyl) ethyl, whether or not further substituted in the indole ring to any extent, including without limitation the following:

(i) UR-144, or (1-pentylindol-3-yl)-(2,2,3,3-tetramethylcyclopropyl)methanone;

(ii) XLR-11, or [1-(5-fluoropentyl)-1H-indol-3-yl]-(2,2,3,3-tetramethylcyclopropyl)methanone;

(iii) A-796,260, or [1-(2-morpholin-4-yl-ethyl)-1H-indol-3-yl]-(2,2,3,3-tetramethylcyclopropyl)methanone;

(iv) 5-Chloro-UR-144, or ([-(5-chloropentyl)-1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone;

(v) 5-Bromo-UR-144, or [1-(5-bromopentyl)-1H-indol-3-yl](2,2,3,3-tetramethylcyclopropyl)methanone; and

(vi) A-834,735, or 1-(tetrahydropyran-4-ylmethyl)-1H-indol-3-yl]-(2,2,3,3-tetramethylcyclopropyl)methanone; or

(K) Unclassified Synthetic Cannabinoids, including without limitation the following:

(i) CP 50556-1 hydrochloride, or [(6S,6aR,9R,10aR)-9-hydroxy-6-methyl-3-[(2R)-5-phenylpentan-2-yl]oxy-5,6,6a,7,8,9,10,10a-octahydrophenanthridin-1-yl] acetate;

(ii) HU-210, or (6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol;

(iii) HU-211, or Dexanabinol,(6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c-]chromen-1-ol;

(iv) Dimethylheptylpyran or DMHP;

(v) WIN55,212-2, or 2,3-Dihydro-5-methyl-3-(4-morpholinylmethyl)pyrrolo[1,2,3-de]-1,4-benzoxazin-6-yl-1-naphthalenylmethanone;

(vi) URB597, or [3-(3-carbamoylphenyl)phenyl] N-cyclohexylcarbamate;

(vii) URB754, or 6-methyl-2-[(4-methylphenyl)amino]-1-benzoxazin-4-one;

(viii) AKB-48, or N-(1-adamantyl)-1-pentylindazole-3-carboxamide;

(ix) CB-13, or 1-naphthalenyl[4-(pentyloxy)-1-naphthalenyl]-methanone;

(x) URB602, or cyclohexyl N-(3-phenylphenyl)carbamate;

(xi) PB-22, or quinolin-8-yl 1-(5-pentyl)-1H-indole-3-carboxylate;

(xii) 5F-PB-22, or quinolin-8-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate;

(xiii) BB-22, or quinolin-8-yl 1-(cyclohexylmethyl)-1H-indole-3-carboxylate;

(xiv) NNEI (MN-24), or N-1-naphthalenyl-1-pentyl-1H-indole-3-carboxamide; and

(xv) 5F-NNEI, or 1-(5-fluoropentyl)-N-(naphthalen-1-yl)-1H-indole-3-carboxamide; or

(6) A synthetic substance, derivative, or its isomers with:

(A) Similar chemical structure to any substance described in subdivisions (a)(1)-(5) of this section; or

(B) Similar pharmacological effects to any substance described in subdivisions (a)(1)-(5) of this section.

(b) However, the director shall not delete a controlled substance listed in this section from Schedule VI.

History. Acts 1971, No. 590, Art. 2, § 15, as added by Acts 1973, No. 186, § 1; 1979, No. 898, § 22; A.S.A. 1947, § 82-2614.2; Acts 1999, No. 1534, § 1; 2001, No. 320, § 3; 2007, No. 827, § 57; 2011, No. 751, § 2; 2013, No. 329, § 1.

Amendments. The 2011 amendment added "In addition to any substance placed in Schedule VI by the Director of the Department of Health under § 5-64-214" in the introductory language of (a); subdivided (a)(3) as (a)(3) and (6); inserted (a)(4) and (5); and inserted "to any substance described in subdivisions (a)(1)-(4) of this section" in (a)(6)(A) and (B).

The 2013 amendment deleted former (a)(4); redesignated former (a)(5) as (a)(4); added present (a)(5); rewrote (a)(6); and substituted "director" for "Director of the Department of Health" in (b).

CASE NOTES

Marijuana.

Although his drug test indicated he had used methamphetamine and marijuana, at the supervised release revocation hearing defendant only admitted to marijuana use, and under subdivision (a)(1) of this section, marijuana was a Schedule IV substance, possession of less than 28 grams of which was only a Class A misdemeanor, which under §§ 5-64-419(b)(4)(A) and 5-4-401(b)(1) (repealed) did not exceed one year of imprisonment and, thus, because the government neither attempted to prove defendant possessed methamphetamine nor introduced any evidence that he possessed more than 28 grams of marijuana, his admission would only have qualified as a misdemeanor, which was a Grade C violation under U.S. Sentencing Guidelines Manual § 7B1.1(a)(3), such that considering improper evidence of other pending state charges was not harmless error as his sentence would not have been the same. United States v. Johnson, 710 F.3d 784 (8th Cir. 2013).

Subchapter 3 — Uniform Controlled Substances Act — Regulation of Distribution

SECTION.
5-64-308. Prescriptions.

5-64-308. Prescriptions.

(a) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, no controlled substance in Schedule II may be dispensed without the written prescription of a practitioner or the oral, faxed, or electronic prescription of a practitioner, if issued in compliance with federal law and regulations.

(b)(1) Except when dispensed directly by a practitioner, other than a pharmacy, to an ultimate user, a controlled substance included in Schedule III or Schedule IV that is a prescription drug shall not be dispensed without a written or oral prescription of a practitioner or the faxed or electronic prescription of a practitioner, if issued in compliance with federal law and regulations.

(2) The prescription shall not be filled or refilled more than six (6) months after the date of the prescription or be refilled more than five (5) times unless renewed by the practitioner.

(c) A controlled substance included in Schedule V shall not be distributed or dispensed other than for a medical purpose.

History. Acts 1971, No. 590, Art. 3, § 2; A.S.A. 1947, § 82-2616; Acts 2013, No. 1331, § 1.

Amendments. The 2013 amendment deleted "Written" from the section heading; added "or the oral, faxed, or electronic prescription of a practitioner, if issued in compliance with federal law and regulations" to the end of (a); rewrote (b)(1) and (2); deleted (b)(3) and former (c); and redesignated former (d) as present (c).

Subchapter 4 — Uniform Controlled Substances Act — Prohibitions and Penalties

SECTION.
5-64-401. [Repealed.]
5-64-402. Controlled substances — Offenses relating to records, maintaining premises, etc.
5-64-403. Controlled substances — Fraudulent practices.
5-64-404. Use of a communication device.
5-64-405. Continuing criminal enterprise.
5-64-406. Delivery to minors — Enhanced penalties.
5-64-407. Manufacture of methamphetamine in the presence of certain persons — Enhanced penalties.
5-64-408. Subsequent convictions — Enhanced penalties.
5-64-410. [Repealed.]
5-64-411. Proximity to certain facilities — Enhanced penalties.
5-64-413. Probation — Discharge and dismissal. [Repealed effective January 1, 2014.]
5-64-414. Controlled substance analog.
5-64-415. Drug precursors.
5-64-419. Possession of a controlled substance.
5-64-420. Possession of methamphetamine or cocaine with the purpose to deliver.
5-64-421. [Reserved.]
5-64-422. Delivery of methamphetamine or cocaine.

Effective Dates. Acts 2013, No. 1460, § 17: effective on and after January 1, 2014.

5-64-401. [Repealed.]

Publisher's Notes. This section, concerning criminal penalties, was repealed by Acts 2011, No. 570, § 33. The section was derived from Acts 1971, No. 590, Art. 4, § 1; 1972 (Ex. Sess.), No. 67, § 1; 1972 (Ex. Sess.), No. 68, § 1; 1973, No. 186, §§ 2, 3; 1975, No. 305, § 2; 1977, No. 557, § 1; 1983, No. 306, § 1; 1983, No. 417, § 1; 1983, No. 787, §§ 3-5; 1985, No. 165, § 1; 1985, No. 472, § 1; 1985, No. 512, § 1; 1985, No. 669, § 1; A.S.A. 1947, § 82-2617; Acts 1989 (3rd Ex. Sess.), No. 82, §§ 1, 2; 1994 (2nd Ex. Sess.), No. 10, § 1; 1994 (2nd Ex. Sess.), No. 46, § 1; 1997, No. 1142, § 1; 1999, No. 1268, § 2; 2001, No. 753, § 1; 2003, No. 1336, § 2; 2005, No. 1994, § 305[A]; 2007, No. 547, § 1; 2007, No. 827, § 58; 2009, No. 572, § 1; 2009, No. 673, § 1; 2009, No. 748, § 26.

CASE NOTES

Analysis

Evidence Sufficient.
Lesser-Included Offense.

Evidence Sufficient.

Trial court did not err in denying defendant's motion for a directed verdict because there was substantial evidence to support defendant's conviction for possession of cocaine with intent to deliver, in violation of subsection (a) of this section; defendant had three cellular telephones attached to defendant's belt and digital scales were found in the glove compartment of defendant's vehicle. Dishman v. State, 2011 Ark. App. 437, 384 S.W.3d 590 (2011).

Lesser-Included Offense.

Defense counsel was not ineffective for not objecting that defendants' convictions violated double jeopardy because possession of methamphetamine with intent to deliver was not a lesser-included offense of manufacturing methamphetamine. Myers v. State, 2012 Ark. 143, — S.W.3d — (2012).

5-64-402. Controlled substances — Offenses relating to records, maintaining premises, etc.

(a) It is unlawful for any person:

(1) To refuse an entry into any premises for any inspection authorized by this chapter; or

(2) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, or other structure or place or premise that is resorted to by a person for the purpose of using or obtaining a controlled substance in violation of this chapter or that is used for keeping a controlled substance in violation of this chapter.

(b)(1) Any person who violates this section is guilty of a Class C felony.

(2) However, a violation of this section is a Class B felony if the violation is committed on or within one thousand feet (1,000') of the real property of a certified drug-free zone.

(c) As used in this section:

(1) "Certified drug-free zone" means:

(A) A city or state park;

(B) A public or private elementary or secondary school, public vocational school, or public or private college or university;

(C) A designated school bus stop as identified on the route list published by a public school district annually;

(D) A publically funded and administered multifamily housing development;

(E) A skating rink, Boys Club, Girls Club, YMCA, YWCA, community center, recreation center, or video arcade;

(F) A drug or alcohol treatment facility;

(G) A day care center;

(H) A church; or

(I) A shelter as defined in § 9-4-102; and

(2) "Recreation center" means a public place consisting of various types of entertainment including without limitation:

(A) Billiards or pool;

(B) Ping pong or table tennis;
(C) Bowling;
(D) Video games;
(E) Pinball machines; or
(F) Any other similar type of entertainment.

History. Acts 1971, No. 590, Art. 4, § 2; 1975 (Extended Sess., 1976), No. 1225, § 1; 1977, No. 557, § 2; A.S.A. 1947, § 82-2618; reen. Acts 1987, No. 1013, § 1; 1993, No. 1189, § 6; 2005, No. 1994, § 305[A]; 2007, No. 827, § 59; 2011, No. 570, § 34.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

Amendments. The 2011 amendment rewrote the introductory paragraph of (c); inserted present (c)(1) and redesignated former (c)(1) through (5) as (c)(1)(A) through (E); added (c)(1)(F) through (I); and added (c)(2).

CASE NOTES

Evidence.

Evidence was sufficient to support defendant's conviction of maintaining a drug premises because it was undisputed that defendant owned the home where the methamphetamine lab was located and because defendant admitted to police officers that the methamphetamine lab was his. Cantrell v. State, 2009 Ark. 456, 343 S.W.3d 591 (2009).

Based upon the evidence, the circuit court's denial of defendant's directed-verdict motion on the offense of maintaining a drug premise was proper. Holt v. State, 2009 Ark. 482, 348 S.W.3d 562 (2009).

Defendant was properly found guilty of maintaining a drug premises, pursuant to subdivision (a)(2) of this section, because there was substantial evidence that defendant, who continued to live at the residence at the time of the search, was in constructive possession of the contraband found in the search, and an informant testified that he made three controlled drug buys from defendant at the residence. Turner v. State, 2009 Ark. App. 822, — S.W.3d — (2009).

Evidence was sufficient to convict defendant of maintaining a drug premises given that an acknowledged crack house was rented to him, a confidential informant testified that he purchased drugs from defendant a day earlier, the serial numbers of money found on defendant matched the money used in the controlled buy, and drugs and paraphernalia were in plain view throughout the home. Carter v. State, 2010 Ark. 293, — S.W.3d — (2010), appeal dismissed, 2011 Ark. 226, — S.W.3d — (2011).

There was sufficient evidence to establish that defendant was in constructive possession of a drug premises under this section, as the state presented evidence that a house was leased to a co-defendant in the name of defendant's sister and that defendant sold controlled substances out of the house and allowed others to use controlled substances there. Loggins v. State, 2010 Ark. 414, — S.W.3d — (2010).

Substantial evidence supported defendant's conviction for maintaining a drug premises in violation of this section because at the very least, there was sufficient evidence to show that defendant knew drugs were being sold from the residence where he lived and that he allowed it to occur; defendant informed a police officer that he would not find any drugs at the house, and that was supported by the allegations that defendant had been selling off-white substances in plastic baggies that field-tested positive for cocaine from the house in the days leading up to the search of the residence, as well as the fact that baggies with off-white residue were found in the master bedroom and hall closet during the search of the residence. Moseby v. State, 2010 Ark. App. 5, — S.W.3d — (2010).

Trial court did not err in convicting defendant of maintaining a drug premise because although the evidence was in conflict as to whether defendant kept or maintained the premise, it was the jury's duty to resolve such a conflict; it was apparent that the jury did not believe defendant's explanation or his wife's testimony. Singleton v. State, 2011 Ark. App. 145, 381 S.W.3d 874 (2011).

Because defendant was present in a room adjacent to a kitchen where two men were sitting with a clear plastic bag of cocaine between them, the evidence was sufficient to convict defendant of unlawful possession of a controlled substance (cocaine) and maintaining a drug premises under, inter alia, subdivision (a)(2) of this section. McDaniel v. State, 2011 Ark. App. 677, — S.W.3d — (2011).

Evidence was sufficient to support a conviction for maintaining a drug premises because appellant led an informant to an apartment for the purchase of drugs, a large amount of drugs were seized from the apartment five days later, and there were three drug-free zones within 1,000 feet of the apartment. Robelo v. State, 2012 Ark. App. 425, — S.W.3d — (2012).

5-64-403. Controlled substances — Fraudulent practices.

(a) It is unlawful for a person to knowingly:

(1) Distribute as a practitioner a Schedule I or Schedule II controlled substance, except under an order form as required by § 5-64-307;

(2) Acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, or theft;

(3) Furnish false or fraudulent material information in or omit any material information from any record, application, report, or other document required to be kept or filed under this chapter;

(4) Make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another person or any likeness of any trademark, trade name, or other identifying mark, imprint, or device of another person upon any drug or container or labeling of a drug or container so as to render the drug a counterfeit substance; or

(5)(A) Agree, consent, or in any manner offer to unlawfully sell, furnish, transport, administer, or give any controlled substance to any person or to arrange for any action described in this subdivision (a)(5)(A), and then to substitute a noncontrolled substance in lieu of the controlled substance bargained for.

(B) The proffer of a controlled substance creates a rebuttable presumption of knowingly agreeing, consenting, or offering to sell, furnish, transport, administer, or give a noncontrolled substance that does not require additional showing of specific purpose to substitute a noncontrolled substance.

(b) A person who violates:

(1) Subdivisions (a)(1), (a)(2), (a)(3), or (a)(4) of this section upon conviction is guilty of a Class D felony; or

(2) Subdivision (a)(5) of this section with respect to a noncontrolled substance represented to be a controlled substance classified in:

(A) Schedule I or Schedule II upon conviction is guilty of a Class C felony;

(B) Schedule III, Schedule IV, or Schedule V upon conviction is guilty of a Class D felony; or

(C) Schedule VI upon conviction is guilty of a Class A misdemeanor.

(c) A second or subsequent offense of attempt to violate subdivision (a)(1), (a)(2), (a)(3), or (a)(4) of this section is a Class D felony.

History. Acts 1971, No. 590, Art. 4, § 3; 1972 (Ex. Sess.), No. 67, § 2; 1977, No. 557, § 3; 1981, No. 78, § 2; 1981, No. 116, §§ 2, 3; 1981, No. 117, § 1; 1983, No. 787, § 6; A.S.A. 1947, § 82-2619; Acts 1999, No. 326, § 1; 1999, No. 1268, § 3; 2001, No. 1451, § 1; 2005, No. 1994, § 305[A]; 2007, No. 827, § 60; 2009, No. 748, § 27; 2011, No. 570, § 35; 2013, No. 1192, §§ 1, 2.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Acts 2013, No. 1192, § 1, did not make changes to this section.

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

Amendments. The 2009 amendment substituted "a person knowingly" for "any person knowingly or intentionally" in (a).

The 2011 amendment rewrote the section.

The 2013 amendment by No. 1192, § 2 added (c).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Trademark Counterfeiting Statutes. 63 A.L.R.6th 303.

CASE NOTES

Analysis

Constitutionality.
Dismissal Denied.
Evidence.
In Furtherance of Felony.
Lesser Included Offense.
Possession.
Sentencing.

Constitutionality.

State was authorized to seek the greatest penalty, the Class B felony, under subdivision (c)(5) of this section; further, it was not so vague and standardless that it allowed for arbitrary and discriminatory enforcement, nor did the fact that the prosecutor exercised discretion in seeking the maximum penalty give rise to a constitutional infringement. Osborne v. State, 94 Ark. App. 337, 230 S.W.3d 290 (2006).

Dismissal Denied.

Motion to dismiss was properly denied in a case involving possession with intent to use drug paraphernalia because a crack pipe constituted paraphernalia under § 5-64-101(14)(C); further, there was sufficient evidence of intent where defendant admitted the pipe was his, cocaine residue was found on the pipe, and defendant admitted to using it to smoke cocaine in the past. White v. State, 98 Ark. App. 366, 255 S.W.3d 881 (2007).

Evidence.

Trial court erred in reversing defendant's conviction for possession of drug paraphernalia with intent to manufacture methamphetamine as his conviction was supported by sufficient evidence, including (1) testimony from a police officer who saw defendant buy iodine and found other items used to manufacture methamphetamine at defendant's home, (2) testimony from defendant's parole officer regarding defendant's prior convictions relating to methamphetamine, and (3) expert testimony concerning how the items found in defendant's possession were used to manufacture methamphetamine. Cluck v. State, 365 Ark. 166, 226 S.W.3d 780 (2006).

Evidence was sufficient to sustain a conviction for possession of drug para-

phernalia with intent to manufacture methamphetamine where an accomplice testified that defendant was inside his residence "cleaning up a cook" and "bagging everything up"; that testimony was corroborated by an officer who stated that, when he entered the home, defendant was in close proximity to the manufacturing items that were seized from the residence. Fitting v. State, 94 Ark. App. 283, 229 S.W.3d 568 (2006).

Evidence was sufficient to sustain defendant's conviction for possession of drug paraphernalia because defendant lived in the residence, and at no point did he deny an ownership or possessory interest in the residence. Testimony established that items of paraphernalia, the spoon with residue, the light bulb, the scales, and the plastic baggies were found in plain view in the southeast bedroom and that the items would have been noticeable to anyone who lived in residence. Tryon v. State, 371 Ark. 25, 263 S.W.3d 475 (2007).

Judgment convicting defendant of manufacturing methamphetamine under § 5-64-401(a)(1), possession of drug paraphernalia with the intent to manufacture methamphetamine under this section, first-degree endangering the welfare of a minor under § 5-27-205(a)(1), manufacturing methamphetamine in the presence of a minor, and manufacturing methamphetamine near certain facilities was affirmed because contraband was found in the kitchen and bedroom of defendant's residence, strewn about his yard, and in an outbuilding behind his residence; the materials found in the search were the components of a methamphetamine lab; at least two of defendant's minor children were present in the residence at the time of the search; and the drug paraphernalia and chemicals found could easily be accessed by the children. Morgan v. State, 2009 Ark. 257, 308 S.W.3d 147 (2009).

Evidence was sufficient to support defendant's conviction of possession of drug paraphernalia with intent to manufacture because the jury could reasonably conclude that defendant constructively possessed the paraphernalia with intent to manufacture where defendant owned the property jointly with his wife, defendant was the only person in the house when the police arrived, and defendant admitted to the officers that the methamphetamine lab in the home was his. Cantrell v. State, 2009 Ark. 456, 343 S.W.3d 591 (2009).

Defendant was convicted of possessing drug paraphernalia with intent to manufacture, in violation of subdivision (b)(5)(A) of this section; based on the evidence of defendant's proximity to the manufacturing paraphernalia, the circuit court did not err in denying defendant's directed-verdict motion. Holt v. State, 2009 Ark. 482, 348 S.W.3d 562 (2009).

In a case in which defendant appealed his convictions for simultaneously violating §§ 5-74-106(a)(1), 5-64-401(b)(1), and subdivision (c)(1)(A)(i) of this section, he argued unsuccessfully that the evidence was insufficient to establish possession. There was substantial evidence that he exercised care, control, and management over the contraband; (1) he lived at the house where the contraband was discovered, (2) a police officer found several illegal items lying in close proximity to defendant, and (3) there was no evidence that there were other suspects in the home at the time of the raid that may have also lived there. Allen v. State, 2010 Ark. App. 266, — S.W.3d — (2010).

Trial court did not err in evoking defendant's suspended sentence on the ground that he committed the offense of possession of drug paraphernalia with the intent to manufacture methamphetamine in violation of subdivision (c)(5) of this section because the evidence showed that a reliable source had tipped off the police to the fact that defendant, contrary to the terms and conditions of his release, was continuing to manufacture methamphetamine, and defendant directed the purchases and provided an explanation for each component of the methamphetamine recipe; it was shown that defendant conceived and proposed the methamphetamine cook, buy, and sell arrangement for the manufacture and distribution of the illegal substance, and simply by asserting the defense of entrapment, § 5-2-209, defendant necessarily admitted committing the offense. Lowe v. State, 2010 Ark. App. 284, — S.W.3d — (2010).

Contact between defendant and an officer was the result of an investigation into drug-related criminal activity, not a routine traffic stop, because the officer blocked the vehicle in the driveway, demanded that defendant move to the back of the vehicle, informed her that he knew

there were drugs in the vehicle, and asked where they were located. Defendant's pre-Miranda statement should have been suppressed. James v. State, 2012 Ark. App. 118, 390 S.W.3d 95 (2012).

Sufficient evidence supported a finding that defendant had the intent to manufacture methamphetamine, in violation of subdivision (c)(5)(A) of this section, because the jury could choose to believe that defendant knew the iodine he possessed was going to be used to make methamphetamine, despite his argument that he bought it for a friend and that no other ingredients were found. Ashley v. State, 2012 Ark. App. 131, — S.W.3d — (2012).

In Furtherance of Felony.

In a case involving the possession with intent to use drug paraphernalia as a Class C felony, the State is required to show that the possession of the drug paraphernalia facilitated that objective, or made the commission of the offense easier; therefore, defendant's motion for a directed verdict was denied, and he was properly convicted of a Class C felony for a crack pipe being used in the furtherance of a felony where the pipe and the drugs were both found on his person, and he testified that he had previously used that same pipe to ingest cocaine. White v. State, 98 Ark. App. 366, 255 S.W.3d 881 (2007).

Lesser Included Offense.

Neither § 5-64-401(c)(1) nor subdivision (c)(1)(A)(i) of this section are lesser included offenses of the other pursuant to the terms of § 5-1-110(b) because the plain language shows that possession of a controlled substance does not require the simultaneous possession of paraphernalia, and possession of paraphernalia does not require the simultaneous possession of a controlled substance; the elements of the two offenses can be completely exclusive of each other. Koster v. State, 374 Ark. 74, 286 S.W.3d 152 (2008).

Possession.

Evidence was sufficient to convict defendant of drug possession charges given that a crack house was rented to him, a confidential informant testified that he purchased drugs from defendant a day earlier, the serial numbers of money found on defendant matched the money used in the controlled buy, and drugs were in plain view in the home. Carter v. State, 2010 Ark. 293, — S.W.3d — (2010), appeal dismissed, 2011 Ark. 226, — S.W.3d — (2011).

Evidence supported a finding that defendant was in constructive possession of drug paraphernalia, as although a house was jointly occupied, there was evidence that defendant told a law enforcement officer that defendant lived there, and that there were male personal effects in the bedroom; a jury could reasonably infer that defendant knew the drug paraphernalia was contraband and that defendant exercised control over it. Burrow v. State, 2010 Ark. App. 692, — S.W.3d — (2010).

Evidence that there was a funnel, plastic tubing, coffee filters, camp fuel, syringes, gloves, a metal spoon, a smoking device, a bag of ammonia nitrate, and a pill crusher in the master bedroom of defendant's home, along with a burn barrel in the back yard, was sufficient to support a conviction for possession of paraphernalia with intent to manufacture. Gowen v. State, 2011 Ark. App. 761, 387 S.W.3d 230 (2011).

Sentencing.

Trial judge did not err in denying defendant's motion to recuse on the ground that the judge knew his fiancee's parents because defendant failed to show bias; defendant's 20-year sentences for two counts of possession of methamphetamine with intent to deliver did not include a possession of drug paraphernalia conviction for which defendant could have received up to 20 years in prison under § 5-4-401(3) and subdivision (c)(5)(A) of this section. Rudd v. State, 2010 Ark. App. 784, — S.W.3d — (2010).

Where defendant was guilty of violating § 5-64-401(a)(1) (repealed by 2011 Ark. Acts 570, § 33) and subdivision (c)(5) of this section and the circuit court sentenced him as a habitual offender pursuant to the § 5-4-501, the sentence was nonetheless illegal because under § 5-4-301(a)(2), the circuit court did not have the authority to suspend 10 years of the 15-year sentence it imposed. State v. O'Quinn, 2013 Ark. 219, — S.W.3d — (2013).

5-64-404. Use of a communication device.

(a)(1) As used in this section, "communication device" means any public or private instrumentality used or useful in the transmission of a writing, sign, signal, picture, or sound of any kind.

(2) "Communication device" includes mail, telephone, wire, radio, and any other means of communication.

(b) A person commits the offense of unlawful use of a communication device if he or she knowingly uses any communication device in committing or in causing or facilitating the commission of any act constituting a:

(1) Felony under this chapter; or

(2) Felony inchoate offense under § 5-3-101 et seq. or this chapter.

(c) Each separate use of a communication device is a separate offense under this section.

(d) Any person who violates this section upon conviction is guilty of a Class C felony.

History. Acts 1971, No. 590, Art. 4, § 4; A.S.A. 1947, § 82-2620; Acts 2005, No. 1994, § 305[A]; 2007, No. 827, § 61; 2011, No. 570, § 36

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

Amendments. The 2011 amendment inserted "upon conviction" in (d).

5-64-405. Continuing criminal enterprise.

(a) A person commits the offense of engaging in a continuing criminal enterprise if he or she:

(1) Violates any provision of this chapter that is a felony, except §§ 5-64-419 and 5-64-441; and

(2) The violation is a part of a continuing series of two (2) or more felony offenses of this chapter, except §§ 5-64-419 and 5-64-441:

(A) That are undertaken by that person in concert with five (5) or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management; and

(B) From which that person obtained substantial income or resources.

(b)(1) A person who engages in a continuing criminal enterprise upon conviction is guilty of an unclassified felony and shall be sentenced to a term of imprisonment up to two (2) times the term otherwise authorized for the underlying offense referenced in subdivision (a)(1) of this section and shall be fined an amount up to two (2) times that authorized for the underlying offense referenced in subdivision (a)(1) of this section.

(2) For any purpose other than disposition, engaging in a continuing criminal enterprise is a Class Y felony.

(c)(1) A person who violates subsection (a) of this section after a previous conviction under subsection (a) of this section has become final upon conviction is guilty of an unclassified felony and shall be punished by a term of imprisonment not exceeding three (3) times that authorized for the underlying offense referenced in subdivision (a)(1) of this section and a fine not exceeding three (3) times the amount authorized for the underlying offense referenced in subdivision (a)(1) of this section.

(2) For any purpose other than disposition, engaging in a continuing criminal enterprise is a Class Y felony.

(d)(1) Upon conviction, the prosecuting attorney may institute a civil action against any person who violates this section to obtain a judgment against all persons who violate this section, jointly and severally, for damages in an amount equal to three (3) times the proceeds acquired by all persons involved in the enterprise or by reason of conduct in furtherance of the enterprise, together with costs incurred for resources and personnel used in the investigation and prosecution of both criminal and civil proceedings.

(2) The standard of proof in an action brought under this section is a preponderance of the evidence.

(3) The procedures in the asset forfeiture law, § 5-64-505, shall apply.

(4) A defendant in a civil action brought under this subsection is entitled to a trial by jury.

(e) An offender found guilty of a violation of this section shall not:

(1) Have his or her sentence suspended;

(2) Be placed on probation;

(3) Have imposition of sentence suspended;

(4) Have the execution of the sentence deferred;

(5) Have the sentence deferred; or

(6) Be eligible for § 16-93-301 et seq.

History. Acts 1971, No. 590, Art. 4, § 5; A.S.A. 1947, § 82-2621; Acts 2005, No. 1994, § 305[A]; 2011, No. 570, § 37; 2013, No. 1125, § 12.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

Amendments. The 2011 amendment substituted "§§ 5-64-419 and 5-64-441" for "§ 5-64-401(c)" in (a)(1) and (a)(2); inserted "upon conviction" and "unclassified" in (b)(1) and (c)(1); and deleted "upon conviction" preceding "shall be" in (b)(1).

The 2013 amendment inserted "deferred" in (e)(4).

5-64-406. Delivery to minors — Enhanced penalties.

(a) Any person eighteen (18) years of age or older who violates § 5-64-422, § 5-64-426, or § 5-64-440 by delivering or trafficking a Schedule I or Schedule II controlled substance that is a narcotic drug or methamphetamine to a person under eighteen (18) years of age who is

at least three (3) years younger than the person is subject to an enhanced sentence of the fine authorized by § 5-64-422, § 5-64-426, or § 5-64-440, a term of imprisonment of up to two (2) times that authorized by § 5-64-422, § 5-64-426, or § 5-64-440, or both.

(b) Any person eighteen (18) years of age or older who violates § 5-64-426, § 5-64-430, § 5-64-434, § 5-64-438, or § 5-64-440 by delivering or trafficking any other controlled substance to a person under eighteen (18) years of age who is at least three (3) years younger than the person is subject to an enhanced sentence of the fine authorized by § 5-64-426, § 5-64-430, § 5-64-434, § 5-64-438, or § 5-64-440, a term of imprisonment up to two (2) times that authorized by § 5-64-426, § 5-64-430, § 5-64-434, § 5-64-438, or § 5-64-440, or both.

(c) A person who is not otherwise subject to an enhancement to his or her sentence as provided in subsection (a) or (b) of this section and is convicted of delivering a controlled substance to a person under eighteen (18) years of age is subject to an additional term of imprisonment of ten (10) years.

History. Acts 1971, No. 590, Art. 4, § 6; A.S.A. 1947, § 82-2622; Acts 2005, No. 1994, § 475; 2011, No. 570, § 38.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment rewrote (a) and (b); and added (c).

5-64-407. Manufacture of methamphetamine in the presence of certain persons — Enhanced penalties.

(a) A person who is found guilty of or who pleads guilty or nolo contendere to manufacture of methamphetamine, § 5-64-423, or possession of drug paraphernalia with the purpose to manufacture methamphetamine, § 5-64-443(a)(1), may be subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if the offense is committed:

(1) In the presence of a minor, elderly person, or incompetent person who may or may not be related to the person;

(2) With a minor, elderly person, or incompetent person in the same home or building where the methamphetamine was being manufactured or where the drug paraphernalia to manufacture methamphetamine was in use or was in preparation to be used; or

(3) With a minor, elderly person, or incompetent person present in the same immediate area or in the same vehicle at the time of the person's arrest for the offense.

(b) The enhanced portion of the sentence is consecutive to any other sentence imposed.

(c) Any person sentenced under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.

(d) As used in this section:

(1) "Elderly person" means any person seventy (70) years of age or older;

(2) "Incompetent person" means any person who is incapable of consent because he or she is physically helpless, mentally defective, or mentally incapacitated; and

(3) "Minor" means any person under eighteen (18) years of age.

History. Acts 1971, No. 590, Art. 4, § 7; 1972 (Ex. Sess.), No. 67, § 3; 1973, No. 186, § 4; A.S.A. 1947, § 82-2623; Acts 1995, No. 998, § 2; 2005, No. 1994, § 304[B]; 2007, No. 200, § 1; 2007, No. 1047, § 3; 2011, No. 570, § 39.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment, in (a), substituted "§ 5-64-423" for "§ 5-64-401(a)(1)" and "§ 5-64-443(a)(1)" for "§ 5-64-403(c)(5)."

5-64-408. Subsequent convictions — Enhanced penalties.

(a) Unless otherwise provided in this chapter, a person convicted of a second or subsequent offense under this chapter shall be imprisoned for a term up to two (2) times the term otherwise authorized, fined an amount up to two (2) times the fine otherwise authorized, or both.

(b) For purposes of this section, an offense is considered a second or subsequent offense if, before his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to a narcotic drug, marijuana, depressant, stimulant, or a hallucinogenic drug.

(c) This section does not apply to an offense under § 5-64-419 or § 5-64-441.

History. Acts 1971, No. 590, Art. 4, § 8; 1973, No. 186, § 5; A.S.A. 1947, § 82-2624; 2005, No. 1994, § 304[B]; 2011, No. 570, § 40.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment inserted "Unless otherwise provided in this chapter" in (a); and substituted "§ 5-64-419 or § 5-64-441" for "§ 5-64-401(c)" in (c).

CASE NOTES

Sentencing.

Appellant filed a petition for writ of habeas corpus that challenged the judgment that imposed an aggregate sentence of 1080 months' imprisonment for possession of cocaine with intent to deliver and possession of marijuana with intent to deliver. The trial court did not err by denying appellant's petition, because he presented only conclusory allegations to support his claim that his sentence was improperly enhanced under this section using an out-of-state conviction. Darrough v. State, 2013 Ark. 28, — S.W.3d — (2013).

Petitioner's post-conviction claim that his sentence was illegal because the jury only gave the numbers "70" and "20" and did not specify years or months was rejected, because 70 months would fall short of the 20-year mandatory minimum for his cocaine conviction and 20 months would fall short of the eight-year minimum for his marijuana conviction, pursuant to former and subsection (a) of this

section. Lewis v. State, 2013 Ark. 105, — S.W.3d — (2013).

5-64-410. [Repealed.]

Publisher's Notes. Former § 5-64-410, concerning enhanced penalties for distribution near a school or college, was repealed by Acts 1991, No. 864, § 2. The former section was derived from Acts 1989, No. 612, § 1. For present law, see § 5-64-411.

This section, concerning penalties for delivery — enhanced penalties, was repealed by Acts 2011, No. 570, § 41. The section was derived from Acts 2005, No. 1994, § 305[B].

5-64-411. Proximity to certain facilities — Enhanced penalties.

(a) A person is subject to an enhanced sentence of an additional term of imprisonment of ten (10) years if:

(1) The person:

(A) Possesses a controlled substance in violation of § 5-64-419 and the offense is a Class C felony or greater; or

(B) Possesses with the purpose to deliver, delivers, manufactures, or trafficks a controlled substance in violation of §§ 5-64-420 — 5-64-440; and

(2) The offense is committed on or within one thousand feet (1,000') of the real property of:

(A) A city or state park;

(B) A public or private elementary or secondary school, public vocational school, or private or public college or university;

(C) A designated school bus stop as identified on the route list published by a public school district each year;

(D) A skating rink, Boys Club, Girls Club, YMCA, YWCA, community center, recreation center, or video arcade;

(E) A publicly funded and administered multifamily housing development;

(F) A drug or alcohol treatment facility;

(G) A day care center;

(H) A church; or

(I) A shelter as defined in § 9-4-102.

(b) The enhanced portion of the sentence is consecutive or concurrent to any other sentence imposed at the discretion of the court.

(c) Any person convicted under this section is not eligible for early release on parole or community correction transfer for the enhanced portion of the sentence.

(d)(1) Except for property covered by subdivision (a)(2)(C) of this section, property covered by this section shall have a notice posted at the entrances to the property stating:

"THE SALE OF DRUGS UPON OR WITHIN ONE THOUSAND FEET (1000') OF THIS PROPERTY MAY SUBJECT THE SELLER OF THE DRUGS TO AN ADDITIONAL TEN (10) YEARS IMPRISONMENT IN ADDITION TO THE TERM OF IMPRISONMENT OTHERWISE PROVIDED FOR THE UNLAWFUL SALE OF DRUGS."

(2) However, the posting of the notice is not a necessary element for the enhancement of a sentence under this section.

(e) As used in this section, "recreation center" means a public place of entertainment consisting of various types of entertainment, including without limitation billiards or pool, ping pong or table tennis, bowling, video games, pinball machines, or any other similar type of entertainment.

History. Acts 1989 (3rd Ex. Sess.), No. 88, § 1; 1991, No. 864, § 1; 1995, No. 778, § 1; 1995, No. 799, § 1; 1997, No. 1056, § 1; 2001, No. 1553, § 12; 2003, No. 1707, § 1; 2005, No. 195, § 1; 2005, No. 1994, § 305[B]; 2007, No. 345, § 1; 2007, No. 827, § 62; 2007, No. 1047, § 3; 2011, No. 570, § 42.

A.C.R.C. Notes. Acts 2007, No. 827, § 62 provides: "Acts 1995, No. 778, § 1, is repealed due to a conflict between that act and Acts 1995, No. 779, § 1, in amending § 5-64-411, and which conflict under § 1-2-207 is resolved in favor of Acts 1995, No. 779."

Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

Amendments. The 2011 amendment rewrote the introductory language in (a); inserted (a)(1) and (2) and redesignated former (a)(1) through (9) as (a)(2)(A) through (I); in (a)(2)(D), substituted "community center" for "or community or" and inserted "or video arcade"; in (b), inserted "or concurrent" and "at the discretion of the court"; and substituted "(a)(2)(C)" for "(a)(3)" in (d)(1).

CASE NOTES

Analysis

Ineffective Assistance of Counsel.
Preservation for Review.

Ineffective Assistance of Counsel.

In an Ark. R. Crim. P. 37.1 case in which an inmate had been convicted of one count of delivery of a controlled substance and received an enhanced sentenced pursuant to subdivision (a)(7) of this section (now subdivision (a)(8)), he unsuccessfully argued that his trial counsel was ineffective for failing to move for a continuance following the state's amendment of the charging information. While his timeline regarding the informant's controlled buy from him and the police officer's measurement of the distance between the church and the sale location was correct, he failed to cite any authority for the proposition that trial counsel had a duty to ask for a continuance based thereon, and trial counsel made the tactical decision to proceed with the trial as scheduled. McCraney v. State, 2010 Ark. 96, — S.W.3d — (2010).

In an Ark. R. Crim. P. 37.1 case in which an inmate had been convicted of one count of delivery of a controlled substance and received an enhanced sentenced pursuant to subdivision (a)(7) of this section (now subdivision (a)(8)), he unsuccessfully argued that his trial counsel was ineffective because he failed to adequately investigate the facts underlying the application of the enhancement prior to trial or to flesh them out appropriately during cross-examination. As to the failure to investigate, the inmate made only a conclusory statement, wholly lacking in allegations of prejudice; as to the cross-examination claim, his argument provided him no relief as he was procedurally barred from raising it on appeal. McCraney v. State, 2010 Ark. 96, — S.W.3d — (2010).

Preservation for Review.

Defendant failed to preserve for appeal the issue that the state did not put him on notice that it was seeking the sentencing enhancement, because defendant failed to raise the issue of notice at trial, which precluded the appellate court from addressing it on appeal. Bell v. State, 101 Ark. App. 144, 272 S.W.3d 110 (2008).

5-64-412. Violations by public officials or law enforcement officers — Enhanced penalties.

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections were subsequently designated § 305[A] and § 305[B].

5-64-413. Probation — Discharge and dismissal. [Repealed effective January 1, 2014.]

(a) When any person who has not previously pleaded guilty or nolo contendere or been found guilty of any offense under this chapter or under any statute of the United States or of any state relating to a controlled substance pleads guilty or nolo contendere to or is found guilty of possession of a controlled substance under § 5-64-419, the court without entering a judgment of guilt and with the consent of the defendant may defer further proceedings and place the defendant on probation for a period of not less than one (1) year under such terms and conditions as may be set by the court.

(b) The court may require as a condition for probation that the defendant undergo an evaluative examination by a physician or medical facility approved by the court and, if warranted, undergo in-patient or out-patient treatment and rehabilitation for drug abuse.

(c) Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided.

(d)(1) Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him or her.

(2) Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for a second or subsequent conviction under § 5-64-408.

(3) There may be only one (1) discharge and dismissal under this section with respect to any person.

(4)(A) A person against whom proceedings are discharged or dismissed may seek to have the criminal records sealed, consistent with the procedures established in § 16-90-901 et seq.

(B) A person who has been placed on probation under this section for a misdemeanor offense shall have his or her record expunged under the procedures established in § 16-90-901 et seq.

History. Acts 2005, No. 1994, § 305[B]; 2011, No. 570, § 43; 2011, No. 626, § 2; 2013, No. 1460, § 2.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Acts 2011, No. 626, § 2, inserted the word "controlled" before "substance" in the former phrase "§ 5-64-401, with the exception of a conviction for possession of a substance listed under Schedule I," in subsection (a) of this section. However, that phrase was specifically repealed by Acts 2011, No. 570, § 43.

Publisher's Notes. As enacted, Acts 2005, No. 1994, contained two sections designated as § 305. The two sections

were subsequently designated § 305[A] and § 305[B].

This section is repealed by Acts 2013, No. 1460, § 2, effective January 1, 2014.

Amendments. The 2011 amendment by No. 570, in (a), inserted "or nolo contendere" twice, and substituted "§ 5-64-419" for "§ 5-64-401, with the exception of a conviction for possession of a substance listed under Schedule I."

The 2011 amendment by No. 626, in (a), substituted "controlled substance" for "narcotic drug, marijuana, stimulant, depressant, or a hallucinogenic drug" and inserted "controlled" preceding "substance listed under Schedule I"; and added (d)(4)(B).

The 2013 amendment repeals this section effective January 1, 2014.

Effective Dates. Acts 2013, No. 1460, § 17: effective on and after January 1, 2014.

5-64-414. Controlled substance analog.

(a)(1) "Controlled substance analog" means a substance:

(A) The chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I or Schedule II or that has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or Schedule II; or

(B) With respect to a particular individual, that the individual represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in Schedule I or Schedule II.

(2) "Controlled substance analog" does not include:

(A) A controlled substance;

(B) A substance for which there is an approved new drug application;

(C) A substance with respect to which an exemption is in effect for investigational use by a particular person under § 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355, to the extent conduct with respect to the substance is pursuant to the exemption; or

(D) Any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(b) A controlled substance analog, to the extent intended for human consumption, is treated for the purposes of this chapter as a substance included in Schedule I.

(c) Within ten (10) days after the initiation of prosecution with respect to a controlled substance analog by indictment or information, the prosecuting attorney shall notify the Director of the Department of Health of information relevant to emergency scheduling as provided for in § 5-64-201(d).

(d) After final determination that the controlled substance analog should not be scheduled, no prosecution relating to that substance as a controlled substance analog may continue or take place.

History. Acts 1989 (3rd Ex. Sess.), No. 84, § 1; 2005, No. 1994, § 306.

Publisher's Notes. This section is being set out to reflect a correction in the subdivision designation (a)(1)(B).

5-64-415. Drug precursors.

(a) Definition.

(1) "Drug precursor" means any substance, material, compound, mixture, or preparation listed in rules and regulations promulgated or adopted pursuant to this section or any of their salts or isomers.

(2) "Drug precursor" specifically excludes those substances, materials, compounds, mixtures, or preparations that:

(A) Are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance that is generally recognized as safe and effective within the meaning of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., as amended; or

(B) Have been manufactured, distributed, or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of § 505 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355, as amended.

(b) Authority to control drug precursors by rule and regulation.

(1)(A) The Department of Health shall promulgate by rule and regulation a list of drug precursors, comprised of any substance, material, compound, mixture, or preparation or any of their salts or isomers that are drug precursors.

(B) The Department of Health may add substances to, delete substances from, and reschedule substances listed in the drug precursors list pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(2) In making a determination regarding a substance to be placed on the drug precursor list, the Department of Health shall consider the following:

(A) Whether the substance is an immediate precursor of a controlled substance;

(B) The actual or relative potential for abuse;

(C) The scientific evidence of the substance's pharmacological effect, if known;

(D) The state of current scientific knowledge regarding the substance or the controlled substance for which it is a precursor;

(E) The history and current pattern of abuse of the controlled substance for which the substance is a precursor;

(F) The scope, duration, and significance of abuse of the controlled substance for which the substance is a precursor;

(G) The risk to the public health; and

(H) The potential of the substance or the controlled substance to produce psychic or physiological dependence liability.

(3) The Department of Health may consider findings of the United States Food and Drug Administration or the United States Drug Enforcement Administration as prima facie evidence relating to one (1)

or more of the factors listed in subdivision (b)(2) of this section in connection with the Department of Health's determination.

(4)(A) After considering the factors enumerated in subdivision (b)(2) of this section, the Department of Health shall make findings with respect to the factors and shall promulgate a rule controlling a substance as a drug precursor upon a finding that the substance has a potential for abuse.

(B) If the Department of Health designates a substance as an immediate drug precursor, a substance that is a precursor of the controlled precursor is not subject to control solely because it is a precursor of the controlled precursor.

(5) Authority to control under this section does not extend to an alcoholic beverage, alcoholic liquor, a fermented malt beverage, or tobacco.

(c) LICENSE REQUIRED — CONTROLLED SUBSTANCES DRUG PRECURSORS.

(1)(A) The Department of Health may promulgate regulations and charge reasonable fees of not more than twenty-five dollars ($25.00) relating to the licensing and control of the manufacture, possession, transfer, and transportation of a drug precursor.

(B)(i) There is created on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State, a cash fund to be known as the "Health Department Drug Precursor Cash Fund".

(ii) The fees established under this subsection shall be collected by the Department of Health and transmitted to the Treasurer of State, who shall credit the fees to the Health Department Drug Precursor Cash Fund.

(iii) The fund shall be administered by the Division of Pharmacy Services and Drug Control of the Department of Health.

(2) Any person that manufactures, possesses, transfers, or transports any drug precursor or that proposes to engage in the manufacture, possession, transfer, or transportation of any drug precursor shall annually obtain a license issued by the Department of Health.

(3) A person licensed by the Department of Health to manufacture, possess, transfer, or transport a drug precursor may manufacture, possess, transfer, or transport the drug precursor to the extent authorized by the person's license and in conformity with any other provision of law.

(4) The following persons are not required to be licensed under this subsection and may lawfully possess a drug precursor:

(A) A physician, dentist, pharmacist, veterinarian, or podiatrist;

(B) An agent of any manufacturer, or wholesaler of any drug precursor if the agent is acting in the usual course of his or her principal's business or employment;

(C) An employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business;

(D) A student enrolled in a college chemistry class for credit if the student's use of the drug precursor is for a bona fide educational

purpose and the educational institution otherwise possesses all the necessary licenses required by the Department of Health;

(E) An officer or employee of an appropriate agency of federal, state, or local government and a law enforcement agency acting pursuant to its official duties; and

(F) Any researcher, including an analytical laboratory, experimenting with, studying, or testing any drug analog that is licensed by the Department of Health pursuant to the requirements of this subsection.

(d) Waiver. The Department of Health may waive by regulation the requirement for licensing of certain manufacturers if the waiver is consistent with the public health and safety.

(e) Issuance of license — Fees.

(1)(A) The Department of Health shall license an applicant to manufacture, possess, transfer, or transport a drug precursor unless it determines that the issuance of the license would be inconsistent with the public interest.

(B) In determining the public interest, the Department of Health shall consider the following factors:

(i) Maintenance of effective controls against diversion of a drug precursor other than a legitimate medical, scientific, or industrial channel;

(ii) Compliance with applicable state and local law;

(iii) Any conviction of the applicant under federal or state law relating to any controlled substance or drug precursor;

(iv) Past experience in the manufacture, possession, transfer, or transportation of a drug precursor and the existence in the applicant's establishment of effective controls against diversion;

(v) Furnishing by the applicant of false or fraudulent material in any application filed under subsection (c) of this section;

(vi) Suspension or revocation of the applicant's federal registration to manufacture, distribute, or dispense a controlled substance or drug precursor authorized by federal law; and

(vii) Any other factor relevant to and consistent with the public health and safety.

(2) Licensing under this section does not entitle a licensee to manufacture, possess, transfer, or transport a drug precursor other than a drug precursor allowed in the license.

(f) Denial, revocation, or suspension of license.

(1) The Department of Health may deny, revoke, or suspend a license issued pursuant to subsection (c) of this section for any of the following reasons:

(A) If a licensee is convicted of, or has accepted by a court a plea of guilty or nolo contendere to a felony under any state or federal law relating to a controlled substance or a drug precursor;

(B)(i) If a licensee has its federal registration to manufacture, conduct research on, distribute, or dispense a controlled substance or a drug precursor suspended or revoked.

(ii) The Department of Health may limit revocation or suspension of a license to the particular controlled substance or drug precursor that was the basis for revocation or suspension; or

(C) If a licensee commits an unlawful act as enumerated in subsection (g) of this section.

(2)(A)(i) When the Department of Health suspends or revokes a license, any controlled substance or drug precursor owned or possessed by the licensee at the time of the suspension or on the effective date of the revocation order may be placed under seal.

(ii) No disposition may be made of a controlled substance or drug precursor under seal until the time for making an appeal has elapsed or until all appeals have been concluded unless a court orders otherwise or orders the sale of any perishable controlled substance or drug precursor and the deposit of the proceeds with the court.

(B) Upon a revocation order becoming final:

(i) Any controlled substance and any drug precursor may be forfeited to the Department of Health;

(ii) Any expense of disposing of a forfeited controlled substance or drug precursor shall be borne by the licensee;

(iii) The court may order the licensee to pay a reasonable sum of money to the Department of Health to cover the expenses of disposition; and

(iv) The Department of Health may seek enforcement of the order of payment, or reimbursement for any expenses through any lawful means.

(g) Unlawful acts — Licenses — Penalties.

(1) It is unlawful to:

(A) Knowingly transfer a drug precursor except to an authorized licensee;

(B) Knowingly use in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended, or issued to another person;

(C) Knowingly acquire or obtain, or attempt to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception, or subterfuge;

(D) Knowingly furnish false or fraudulent material information in, or omitting any material information from, any application, report, or other document required to be kept or filed under this section or any record required to be kept by this section;

(E) Have knowledge of the manufacture of a drug precursor not authorized by a licensee's license, or have knowledge of the transfer of a drug precursor not authorized by the licensee's license to another licensee or authorized person;

(F) Refuse entry into any premises for any inspection authorized by this section; or

(G) Manufacture, possess, transfer, or transport a drug precursor without the appropriate license or in violation of any rule or regulation of the Department of Health.

(2) Any person who violates a provision of this subsection is guilty of a Class D felony.

(h) Records to be kept — Order forms.

(1) A manufacturer, wholesaler, retailer, or other person that sells, transfers, or otherwise furnishes any drug precursor to a person shall make an accurate and legible record of the transaction and maintain the record for a period of at least two (2) years after the date of the transaction.

(2) Before selling, transferring, or otherwise furnishing to a person in this state a precursor substance subject to subdivision (h)(1) of this section, a manufacturer, wholesaler, retailer, or other person shall:

(A) If the receipient does not represent a business, obtain from the recipient:

(i) The recipient's driver's license number or other personal identification certificate number, date of birth, and residential or mailing address, other than a post office box number, from a driver's license or personal identification card issued by the Department of Finance and Administration that contains a photograph of the recipient;

(ii) The year, state, and number of the motor vehicle license of the motor vehicle owned or operated by the recipient;

(iii) A complete description of how the substance is to be used; and

(iv) The recipient's signature;

(B) If the recipient represents a business, obtain from the recipient:

(i) A letter of authorization from the business that includes the business license or comptroller tax identification number, address, area code, and telephone number, and a complete description of how the substance is to be used; and

(ii) The recipient's signature; and

(C) For any recipient, sign as a witness to the signature and identification of the recipient.

(3)(A) Except as otherwise provided in this section, a manufacturer, wholesaler, retailer, or other person that sells, transfers, or otherwise furnishes to a person in this state a drug precursor shall submit to the Department of Health, at least twenty-one (21) days before the delivery of the drug precursor, a report of the transaction on a form obtained from the Department of Health that includes the information required by subdivisions (h)(2)(A) or (B) of this section.

(B) A copy of this report shall be transmitted to the Department of Arkansas State Police.

(i) Reports of theft, loss, shipping discrepancies, and other transactions.

(1) The theft or loss of any drug precursor discovered by any person regulated by this section shall be reported to the Department of Health and the Department of Arkansas State Police within three (3) days after the discovery.

(2)(A) Any difference between the quantity of any drug precursor received and the quantity shipped shall be reported to the Department of Health within three (3) days after the receipt of actual knowledge of the discrepancy.

(B) When applicable, any report made pursuant to this subsection shall also include the name of any common carrier or person that transported the substance and the date of shipment of the substance.

(3) Any manufacturer, wholesaler, retailer, or other person subject to any other reporting requirement in this section that receives from a source outside of this state any drug precursor specified in rules and regulations promulgated pursuant to this section shall submit a report of the transaction to the Department of Health in accordance with rules adopted by the Department of Health.

(4) Any person violating any provision of this subsection is guilty of a Class A misdemeanor.

(5) The Department of Health may authorize a manufacturer, wholesaler, retailer, or other person to submit a comprehensive monthly report instead of the report required by subdivision (i)(2)(A) of this section if the Director of the Department of Health determines that:

(A) There is a pattern of regular supply and purchase of the drug precursor between the furnisher and the recipient; or

(B) The recipient has established a record of utilization of the drug precursor solely for a lawful purpose.

(j) Investigations and inspections.

(1) The Department of Arkansas State Police specifically may investigate any violation of a provision of this section, and enforce its provisions.

(2) Further, the Department of Arkansas State Police and the Department of Health shall exchange information gathered or received by either agency under the provisions of this section.

(3) Any record kept by a licensee pursuant to this section is open to inspection by an authorized investigator of the Department of Arkansas State Police or the Department of Health during normal business hours and at any other reasonable time.

(k) In addition to rules and regulations authorized by a provision of this section, the Department of Health may promulgate necessary rules and regulations to carry out the provisions of this section.

History. Acts 1991, No. 954, §§ 1, 3, 4; 2007, No. 827, §§ 63, 64.

5-64-419. Possession of a controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to possess a controlled substance.

(b) A person who violates this section with respect to:

(1) A Schedule I or Schedule II controlled substance that is methamphetamine or cocaine with an aggregate weight, including an adulterant or diluent, of:

(A) Less than two grams (2g) upon conviction is guilty of a Class D felony;

(B) Two grams (2g) or more but less than ten grams (10g) upon conviction is guilty of a Class C felony; or

(C) Ten grams (10g) or more but less than two hundred grams (200g) upon conviction is guilty of a Class B felony;

(2) A Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine with an aggregate weight, including an adulterant or diluent, of:

(A) Less than two grams (2g) upon conviction is guilty of a Class D felony;

(B) Two grams (2g) or more but less than twenty-eight grams (28g) upon conviction is guilty of a Class C felony; or

(C) Twenty-eight grams (28g) or more but less than two hundred grams (200g) upon conviction is guilty of a Class B felony;

(3) A Schedule III controlled substance with an aggregate weight, including an adulterant or diluent, of:

(A)(i) Less than two grams (2g) upon conviction is guilty of a Class A misdemeanor.

(ii) However, if the person has four (4) or more prior convictions under this section or the former § 5-64-401(c), upon conviction the person is guilty of a Class D felony for a violation of subdivision (b)(3)(A)(i) of this section;

(B) Two grams (2g) or more but less than twenty-eight grams (28g) upon conviction is guilty of a Class D felony;

(C) Twenty-eight grams (28g) or more but less than two hundred grams (200g) upon conviction is guilty of a Class C felony; or

(D) Two hundred grams (200g) or more but less than four hundred grams (400g) upon conviction is guilty of a Class B felony;

(4) A Schedule IV or Schedule V controlled substance with an aggregate weight, including an adulterant or diluent, of:

(A)(i) Less than twenty-eight grams (28g) upon conviction is guilty of a Class A misdemeanor.

(ii) However, if the person has four (4) or more prior convictions under this section or the former § 5-64-401(c), upon conviction the person is guilty of a Class D felony for a violation of subdivision (b)(4)(A)(i) of this section;

(B) Twenty-eight grams (28g) or more but less than two hundred grams (200g) upon conviction is guilty of a Class D felony;

(C) Two hundred grams (200g) or more but less than four hundred grams (400g) upon conviction is guilty of a Class C felony; or

(D) Four hundred grams (400g) or more but less than eight hundred grams (800g) upon conviction is guilty of a Class B felony; or

(5) A Schedule VI controlled substance with an aggregate weight, including an adulterant or diluent, of:

(A) Less than four ounces (4 oz.) upon conviction is guilty of a Class A misdemeanor;

(B) One ounce (1 oz.) or more but less than four ounces (4 oz.) and the person has four (4) previous convictions under this section or the former § 5-64-401(c) upon conviction is guilty of a Class D felony;

(C) Four ounces (4 oz.) or more but less than ten pounds (10 lbs.) upon conviction is guilty of a Class D felony;

(D) Ten pounds (10 lbs.) or more but less than twenty-five pounds (25 lbs.) upon conviction is guilty of a Class C felony;

(E) Twenty-five pounds (25 lbs.) or more but less than one hundred pounds (100 lbs.) upon conviction is guilty of a Class B felony; or

(F) One hundred pounds (100 lbs.) or more but less than five hundred pounds (500 lbs.) upon conviction is guilty of a Class A felony.

(c) If a person possesses a controlled substance in violation of this section while the person is an inmate in a state criminal detention facility, county criminal detention facility, city criminal detention facility, or juvenile detention facility, the penalty for the offense is increased to the next higher classification as prescribed by law for the offense.

History. Acts 2011, No. 570, § 44; 2013, No. 529, § 1.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2013 amendment redesignated former (b)(3)(A) as (b)(3)(A)(i), and added (b)(3)(A)(ii); inserted "grams" preceding "(200g)" in (b)(3)(C); redesignated former (b)(4)(A) as (b)(4)(A)(i), and added (b)(4)(A)(ii); redesignated (b)(5)(i) through (vi) as (b)(5)(A) through (F); and substituted "four (4) previous convictions" for "two (2) previous convictions" in (b)(5)(B).

CASE NOTES

Analysis

Marijuana.
Possession.

Marijuana.

Although his drug test indicated he had used methamphetamine and marijuana, at the supervised release revocation hearing defendant only admitted to marijuana use, and under § 5-64-215(a)(1), marijuana was a Schedule IV substance, possession of less than 28 grams of which was only a Class A misdemeanor, which under subdivision (b)(4)(A) of this section and § 5-4-401(b)(1) (repealed) did not exceed one year of imprisonment and, thus, because the government neither attempted to prove defendant possessed methamphetamine nor introduced any evidence that he possessed more than 28 grams of marijuana, his admission would only have qualified as a misdemeanor, which was a Grade C violation under U.S. Sentencing Guidelines Manual § 7B1.1(a)(3), such that considering improper evidence of other pending state charges was not harmless error as his sentence would not have been the same. United States v. Johnson, 710 F.3d 784 (8th Cir. 2013).

Possession.

Sufficient evidence was presented to indicate that defendant knew there was contraband in the flatbed trailer he was towing, even though it was open to access from the general public, because defendant was the only person in the vehicle and more than 200 pounds of marijuana were found. Thus, there was sufficient evidence that he was in actual possession of the drugs. Barrera v. State, 2012 Ark. App. 533, — S.W.3d — (2012).

Defendant's conviction for possessing at least four ounces but less than 10 pounds of marijuana, in violation of subdivision (b)(5)(iii) of this section, was proper because there was sufficient evidence that defendant constructively possessed the marijuana; the marijuana was near defendant when officers raided the house, he told a detective that he lived in the house, and he had some mail in the house. Duggar v. State, 2013 Ark. App. 135, — S.W.3d — (2013).

5-64-420. Possession of methamphetamine or cocaine with the purpose to deliver.

(a) Except as provided by this chapter, it is unlawful if a person possesses methamphetamine or cocaine with the purpose to deliver the methamphetamine or cocaine. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh, separate, or package methamphetamine or cocaine; or

(2) The person possesses a record indicating a drug-related transaction; or

(3) The methamphetamine or cocaine is separated and packaged in a manner to facilitate delivery; or

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of methamphetamine or cocaine; or

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver methamphetamine or cocaine.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person possessed less than two grams (2g) of methamphetamine or cocaine by aggregate weight, including an adulterant or diluent;

(2) Class B felony if the person possessed two grams (2g) or more but less than ten grams (10g) of methamphetamine or cocaine by aggregate weight, including an adulterant or diluent; or

(3) Class A felony if the person possessed ten grams (10g) or more but less than two hundred grams (200g) of methamphetamine or cocaine by aggregate weight, including an adulterant or diluent.

History. Acts 2011, No. 570, § 45.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

CASE NOTES

Analysis

Evidence.
Sentencing.

Evidence.

Contact between defendant and an officer was the result of an investigation into drug-related criminal activity, not a routine traffic stop, because the officer blocked the vehicle in the driveway, demanded that defendant move to the back of the vehicle, informed her that he knew there were drugs in the vehicle, and asked where they were located. Defendant's pre-Miranda statement should have been suppressed. James v. State, 2012 Ark. App. 118, 390 S.W.3d 95 (2012).

Evidence was not sufficient to convict defendant of possession with intent to deliver cocaine found in a vehicle registered to his brother. Although cocaine was found on both sides of the vehicle, it was sufficiently well hidden that defendant would not have been aware of its presence simply by riding in or driving the vehicle;

there was no evidence he had been in or around the vehicle before a trip with his brother; and the only evidence of nervousness was that he did not make eye contact with the officer. Bustillos v. State, 2012 Ark. App. 654, — S.W.3d —, 2012 Ark. App. LEXIS 775 (Nov. 14, 2012).

Evidence was sufficient to convict defendant of possession with intent to deliver cocaine found in a vehicle registered to him and covered by an insurance policy that only lasted 30 days. The cocaine was found in a location that would take time and effort to access and was hidden in a manner that would not have been possible for a transient passenger; also, defendant appeared nervous during the stop. Bustillos v. State, 2012 Ark. App. 654, — S.W.3d —, 2012 Ark. App. LEXIS 775 (Nov. 14, 2012).

Sentencing.

Failure of the State to plead a specific amount of cocaine alleged to have been possessed did not limit the sentence that defendant could receive to the minimum allowed under § 5-64-401. Bustillos v. State, 2012 Ark. App. 654, — S.W.3d —, 2012 Ark. App. LEXIS 775 (Nov. 14, 2012).

5-64-421. [Reserved.]

5-64-422. Delivery of methamphetamine or cocaine.

(a) Except as provided by this chapter, it is unlawful for a person to deliver methamphetamine or cocaine.

(b)(1) A person who delivers less than two grams (2g) by aggregate weight, including an adulterant or diluent, of methamphetamine or cocaine upon conviction is guilty of a Class C felony.

(2) A person who delivers two grams (2g) or more but less than ten grams (10g) by aggregate weight, including an adulterant or diluent, of methamphetamine or cocaine upon conviction is guilty of a Class B felony.

(3) A person who delivers ten grams (10g) or more but less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of methamphetamine or cocaine upon conviction is guilty of a Class Y felony.

History. Acts 2011, No. 570, § 46.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-423. Manufacture of methamphetamine — Manufacture of cocaine.

(a)(1) Except as provided by this chapter, it is unlawful for a person to manufacture methamphetamine.

(2)(A) A person who manufactures methamphetamine in an amount less than two grams (2g) by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class C felony.

(B)(i) A person who manufactures methamphetamine in an amount of two grams (2g) or more by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class Y felony.

(ii)*(a)* However, a person who manufactures methamphetamine in an amount of two grams (2g) or more by aggregate weight, including an adulterant or diluents, upon conviction is guilty of a Class A felony

if the person shows by a preponderance of the evidence that he or she manufactured the methamphetamine for personal use only.

(b) Factors indicative of personal use may include without limitation the:

(1) Person did not make a delivery of methamphetamine;

(2) Quantity of methamphetamine manufactured by the person; or

(3) Method of manufacturing methamphetamine used by the person.

(3) A person who has one (1) or more prior convictions of manufacturing methamphetamine in any amount under this section or the former § 5-64-401 upon conviction is guilty of a Class Y felony.

(b)(1) Except as provided by this chapter, it is unlawful for a person to manufacture cocaine.

(2)(A) A person who manufactures cocaine in an amount less than two grams (2g) by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class C felony.

(B) A person who manufactures cocaine in an amount of two grams (2g) or more but less than ten grams (10g), by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class B felony.

(C) A person who manufactures cocaine in an amount of ten grams (10g) or more but less than two hundred grams (200g), by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class Y felony.

History. Acts 2011, No. 570, § 47.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-424. Possession of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine with the purpose to deliver.

(a) Except as provided in this chapter, it is unlawful if a person possesses a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine with the purpose to deliver the Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh, separate, or package a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine; or

(2) The person possesses a record indicating a drug-related transaction; or

(3) The Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine is separated and packaged in a manner to facilitate delivery; or

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule I or

Schedule II controlled substance that is not methamphetamine or cocaine; or

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person possessed by aggregate weight, including an adulterant or diluent less than two grams (2g) of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine;

(2) Class B felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Two grams (2g) or more but less than twenty-eight grams (28g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (b)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units of hydromorphone hydrochloride; or

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units of lysergic acid diethylamide (LSD); or

(D) Eighty (80) or more but less than one hundred sixty (160) dosage units but not more than two hundred grams (200g) for any other Schedule I or II depressant or hallucinogenic drug; or

(E) Eighty (80) or more but less than one hundred sixty (160) dosage units but not more than two hundred grams (200g) for any other Schedule I or II stimulant drug; or

(3) Class A felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Twenty-eight grams (28g) or more but less than two hundred grams (200g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (b)(3); or

(B) One hundred twenty-eight milligrams (128mg) or more or one hundred sixty (160) dosage units or more but less than two hundred grams (200g) of hydromorphone hydrochloride; or

(C) One thousand six hundred micrograms (1,600μ) or more or one hundred sixty (160) dosage units or more but less than two hundred grams (200g) of lysergic acid diethylamide (LSD); or

(D) One hundred sixty (160) dosage units or more regardless of weight but less than two hundred grams (200g) for any other Schedule I or Schedule II depressant or hallucinogenic drug; or

(E) One hundred sixty (160) dosage units or more regardless of weight but less than two hundred grams (200g) for any other Schedule I or Schedule II stimulant drug.

(c) It is a defense to a prosecution under this section that the person possessed less than the minimum listed amount of a Schedule I or

Schedule II controlled substance that is not methamphetamine or cocaine and that is listed in this section.

History. Acts 2011, No. 570, § 48.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-425. [Reserved.]

5-64-426. Delivery of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine.

(a) This section does not apply to the delivery of methamphetamine or cocaine, which is governed by § 5-64-422.

(b) Except as provided in this chapter, it is unlawful for a person to deliver a Schedule I or Schedule II controlled substance.

(c) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person delivered by aggregate weight, including an adulterant or diluent, less than two grams (2g) of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine;

(2) Class B felony if the person delivered by aggregate weight, including an adulterant or diluent:

(A) Two grams (2g) or more but less than twenty-eight grams (28g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (c)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units of hydromorphone hydrochloride;

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units of lysergic acid diethylamide (LSD);

(D) Eighty (80) or more but less than one hundred sixty (160) dosage units but not more than two hundred grams (200g) for any other Schedule I or Schedule II depressant or hallucinogenic drug; or

(E) Eighty (80) or more but less than one hundred sixty (160) dosage units but not more than two hundred grams (200g) for any other Schedule I or Schedule II stimulant drug; or

(3) Class A felony if the person delivered by aggregate weight, including an adulterant or diluent:

(A) Twenty-eight grams (28g) or more but less than two hundred grams (200g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (c)(3); or

(B) One hundred sixty (160) dosage units or more but less than two hundred grams (200g) of hydromorphone hydrochloride; or

(C) One hundred sixty (160) dosage units or more but less than two hundred grams (200g) of lysergic acid diethylamide (LSD); or

(D) One hundred sixty (160) dosage units or more regardless of weight but less than two hundred grams (200g) for any other Schedule I or Schedule II depressant or hallucinogenic drug; or

(E) One hundred sixty (160) dosage units or more regardless of weight but less than two hundred grams (200g) for any other Schedule I or Schedule II stimulant drug.

History. Acts 2011, No. 570, § 49.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-427. Manufacture of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine.

(a) This section does not apply to the manufacture of methamphetamine or cocaine, which is governed by § 5-64-423.

(b) Except as provided by this chapter, it is unlawful for a person to manufacture a Schedule I or Schedule II controlled substance.

(c) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person manufactured by aggregate weight, including an adulterant or diluent, less than two grams (2g) of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine;

(2) Class B felony if the person manufactured by aggregate weight, including an adulterant or diluent:

(A) Two grams (2g) or more but less than twenty-eight grams (28g) of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (c)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units of hydromorphone hydrochloride;

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units of lysergic acid diethylamide (LSD);

(D) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule I or Schedule II depressant or hallucinogenic drug regardless of weight; or

(E) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule I or Schedule II stimulant drug regardless of weight; or

(3) Class A felony if the person manufactured by aggregate weight, including an adulterant or diluent:

(A) Twenty-eight grams (28g) or more of a Schedule I or Schedule II controlled substance that is not methamphetamine, cocaine, or a controlled substance listed in this subdivision (c)(3); or

(B) One hundred sixty (160) dosage units or more of hydromorphone hydrochloride; or

(C) One hundred sixty (160) or more dosage units of lysergic acid diethylamide (LSD); or

(D) One hundred sixty (160) dosage units or more regardless of weight for any other Schedule I or II depressant or hallucinogenic drug; or

(E) One hundred sixty (160) dosage units or more regardless of weight for any other Schedule I or II stimulant drug.

History. Acts 2011, No. 570, § 50.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-428. Possession of a Schedule III controlled substance with the purpose to deliver.

(a) Except as provided by this chapter, it is unlawful if a person possesses a Schedule III controlled substance with the purpose to deliver the Schedule III controlled substance. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh, separate, or package a Schedule III controlled substance; or

(2) The person possesses a record indicating a drug-related transaction; or

(3) The Schedule III controlled substance is separated and packaged in a manner to facilitate delivery; or

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule III controlled substance; or

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule III controlled substance.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class C felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Less than twenty-eight grams (28g) of a Schedule III controlled substance that is not a controlled substance listed in this subdivision (b)(1);

(B) Less than eighty (80) dosage units for any other Schedule III depressant or hallucinogenic drug; or

(C) Less than eighty (80) dosage units for any other Schedule III stimulant drug;

(2) Class B felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Twenty-eight grams (28g) or more but less than two hundred grams (200g) of a Schedule III controlled substance that is not a controlled substance listed in this subdivision (b)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule III depressant or hallucinogenic drug; or

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule III stimulant drug; or

(3) Class A felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Two hundred grams (200g) or more but less than four hundred grams (400g) of a Schedule III controlled substance not a controlled substance listed in this subdivision (b)(3);

(B) One hundred sixty (160) dosage units or more for any other Schedule III depressant or hallucinogenic drug; or

(C) One hundred sixty (160) dosage units or more for any other Schedule III stimulant drug.

(c) It is a defense to a prosecution under this section that the person possessed less than the minimum listed amount of a Schedule III controlled substance that is listed in this section.

History. Acts 2011, No. 570, § 51; 2013, No. 529, § 2.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2013 amendment substituted "Less" for "Forty (40) or more but less" in (b)(1)(B) and (b)(1)(C).

5-64-429. [Reserved.]

5-64-430. Delivery of a Schedule III controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to deliver a Schedule III controlled substance.

(b)(1) A person who delivers less than twenty-eight grams (28g) by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class C felony.

(2) A person who delivers twenty-eight grams (28g) or more but less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class B felony.

(3) A person who delivers two hundred grams (200g) or more but less than four hundred grams (400g) by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class A felony.

History. Acts 2011, No. 570, § 52.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-431. Manufacture of a Schedule III controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to manufacture a Schedule III controlled substance.

(b)(1) A person who manufactures less than twenty-eight grams (28g) by aggregate weight, including an adulterant or diluent, of a

Schedule III controlled substance upon conviction is guilty of a Class C felony.

(2) A person who manufactures twenty-eight grams (28g) or more but less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class B felony.

(3) A person who manufactures two hundred grams (200g) or more by aggregate weight, including an adulterant or diluent, of a Schedule III controlled substance upon conviction is guilty of a Class A felony.

History. Acts 2011, No. 570, § 53.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-432. Possession of a Schedule IV or Schedule V controlled substance with the purpose to deliver.

(a) Except as provided by this chapter, it is unlawful if a person possesses a Schedule IV or Schedule V controlled substance with the purpose to deliver the Schedule IV or Schedule V controlled substance. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh and separate a Schedule IV or Schedule V controlled substance; or

(2) The person possesses a record indicating a drug-related transaction; or

(3) The Schedule IV or Schedule V controlled substance is separated and packaged in a manner to facilitate delivery; or

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule IV or Schedule V controlled substance; or

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule IV or V controlled substance.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class D felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Less than two hundred grams (200g) of a Schedule IV or Schedule V controlled substance that is not a controlled substance listed in this subdivision (b)(1);

(B) Less than eighty (80) dosage units for any other Schedule IV or Schedule V depressant or hallucinogenic drug; or

(C) Less than eighty (80) dosage units for any other Schedule IV or Schedule V stimulant drug;

(2) Class C felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Two hundred grams (200g) or more but less than four hundred grams (400g) of a Schedule IV or Schedule V controlled substance that is not a controlled substance listed in this subdivision (b)(2);

(B) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule IV or Schedule V depressant or hallucinogenic drug; or

(C) Eighty (80) or more but less than one hundred sixty (160) dosage units for any other Schedule IV or Schedule V stimulant drug; or

(3) Class B felony if the person possessed by aggregate weight, including an adulterant or diluent:

(A) Four hundred grams (400g) or more but less than eight hundred grams (800g) of a Schedule IV or Schedule V controlled substance that is not a controlled substance listed in this subdivision (b)(3);

(B) One hundred sixty (160) dosage units or more but less than eight hundred grams (800g) for any other Schedule IV or Schedule V depressant or hallucinogenic drug; or

(C) One hundred sixty (160) dosage units or more but less than eight hundred grams (800g) for any other Schedule IV or Schedule V stimulant drug.

(c) It is a defense to a prosecution under this section that the person possessed less than the minimum listed amount of a Schedule IV or Schedule V controlled substance that is listed in this section.

History. Acts 2011, No. 570, § 54; 2013, No. 529, § 3.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2013 amendment substituted "Less" for "Forty (40) or more but less" in (b)(1)(B) and (b)(1)(C).

5-64-433. [Reserved.]

5-64-434. Delivery of a Schedule IV or Schedule V controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to deliver a Schedule IV or Schedule V controlled substance.

(b)(1) A person who delivers less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class D felony.

(2) A person who delivers two hundred grams (200g) or more but less than four hundred grams (400g) by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class C felony.

(3) A person who delivers four hundred grams (400g) or more but less than eight hundred grams (800g) by aggregate weight, including an

adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class B felony.

History. Acts 2011, No. 570, § 55.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-435. Manufacture of a Schedule IV or Schedule V controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to manufacture a Schedule IV or Schedule V controlled substance.

(b)(1) A person who manufactures less than two hundred grams (200g) by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class D felony.

(2) A person who manufactures two hundred grams (200g) or more but less than four hundred grams (400g) by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class C felony.

(3) A person who manufactures four hundred grams (400g) or more by aggregate weight, including an adulterant or diluent, of a Schedule IV or Schedule V controlled substance upon conviction is guilty of a Class B felony.

History. Acts 2011, No. 570, § 56.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-436. Possession of a Schedule VI controlled substance with the purpose to deliver.

(a) Except as provided by this chapter, it is unlawful if a person possesses a Schedule VI controlled substance with the purpose to deliver the Schedule VI controlled substance. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh and separate a Schedule VI controlled substance; or

(2) The person possesses a record indicating a drug-related transaction; or

(3) The Schedule VI controlled substance is separated and packaged in a manner to facilitate delivery; or

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule VI controlled substance; or

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule VI controlled substance.

(b) A person who violates this section upon conviction is guilty of a:

(1) Class A misdemeanor if the person possessed by aggregate weight, including an adulterant or diluent, fourteen grams (14g) or less of a Schedule VI controlled substance;

(2) Class D felony if the person possessed more than fourteen grams (14g) but less than four ounces (4 oz.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance;

(3) Class C felony if the person possessed four ounces (4 oz.) or more but less than twenty-five pounds (25 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance;

(4) Class B felony if the person possessed twenty-five pounds (25 lbs.) or more but less than one hundred pounds (100 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance; or

(5) Class A felony if the person possessed one hundred pounds (100 lbs.) or more but less than five hundred pounds (500 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance.

History. Acts 2011, No. 570, § 57.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-437. [Reserved.]

5-64-438. Delivery of a Schedule VI controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to deliver a Schedule VI controlled substance.

(b)(1) A person who delivers fourteen grams (14g) or less by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a:

(A) Class A misdemeanor; or

(B) Class D felony if he or she has four (4) or more prior convictions for delivery of a controlled substance in any amount under this subchapter or under the former § 5-64-401.

(2) A person who delivers more than fourteen grams (14g) but less than four ounces (4 oz.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class D felony.

(3) A person who delivers four ounces (4 oz.) or more but less than twenty-five pounds (25 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class C felony.

(4) A person who delivers twenty-five pounds (25 lbs.) or more but less than one hundred pounds (100 lbs.) by aggregate weight, including

an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class B felony.

(5) A person who delivers one hundred pounds (100 lbs.) or more but less than five hundred pounds (500 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class A felony.

History. Acts 2011, No. 570, § 58; 2013, No. 530, § 1.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2013 amendment deleted "Class A misdemeanor" at the end of (b)(1); and added (b)(1)(A) and (b)(1)(B).

5-64-439. Manufacture of a Schedule VI controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to manufacture a Schedule VI controlled substance.

(b)(1) A person who manufactures fourteen grams (14g) or less by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance is guilty of a Class A misdemeanor.

(2) A person who manufactures more than fourteen grams (14g) but less than four ounces (4 oz.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance is guilty of a Class D felony.

(3) A person who manufactures four ounces (4 oz.) or more but less than twenty-five pounds (25 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class C felony.

(4) A person who manufactures twenty-five pounds (25 lbs.) or more but less than one hundred pounds (100 lbs.) by aggregate weight, including an adulterant or diluent, of a Schedule VI controlled substance upon conviction is guilty of a Class B felony.

(5) A person who manufactures one hundred pounds (100 lbs.) or more by aggregate weight, including an adulterant or diluent, upon conviction is guilty of a Class A felony.

History. Acts 2011, No. 570, § 59.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-440. Trafficking a controlled substance.

(a) Except as provided by this chapter, it is unlawful for a person to engage in trafficking a controlled substance.

(b) A person engages in trafficking a controlled substance if he or she possesses, possesses with the purpose to deliver, delivers, or manufactures a controlled substance by aggregate weight, including an adulterant or diluent, in the following amounts:

(1) Methamphetamine or cocaine, two hundred grams (200g) or more;

(2) Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine, two hundred grams (200g) or more;

(3) Schedule III controlled substance, four hundred grams (400g) or more;

(4) Schedule IV or Schedule V controlled substance, eight hundred grams (800g) or more; or

(5) A Schedule VI controlled substance, five hundred pounds (500 lbs.) or more.

(c) Trafficking a controlled substance is a Class Y felony.

History. Acts 2011, No. 570, § 60; 2013, No. 529, § 4.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2013 amendment inserted "possesses with the purpose to deliver, delivers, or manufactures" in the introductory language of (b).

5-64-441. Possession of a counterfeit substance.

(a) It is unlawful for any person to possess a counterfeit substance unless the counterfeit substance was obtained:

(1) Directly from or pursuant to a valid prescription or an order of a practitioner while acting in the course of his or her professional practice; or

(2) As otherwise authorized by this chapter.

(b) Any person who violates this section with respect to:

(1) A Schedule I or Schedule II controlled substance upon conviction is guilty of a Class D felony;

(2) Any other controlled substance, first offense or second offense, upon conviction is guilty of a Class A misdemeanor; and

(3) Any other controlled substance, third or subsequent offense, upon conviction is guilty of a Class D felony.

(c) For purposes of subsection (b) of this section, an offense is considered a third or subsequent offense if, before his or her conviction for the offense, the person has been convicted two (2) or more times for an offense under subsection (b) of this section or under any equivalent penal statute of the United States or of any state.

History. Acts 2011, No. 570, § 61; 2013, No. 1125, § 13.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2013 amendment inserted "upon conviction" in (b)(1).

5-64-442. Possession with the purpose to deliver, delivery, or manufacture of a counterfeit substance.

(a) Except as authorized by this chapter, it is unlawful for any person to possess with the purpose to deliver, deliver, or manufacture a

counterfeit substance. Purpose to deliver may be shown by any of the following factors:

(1) The person possesses the means to weigh, separate, or package a counterfeit substance;

(2) The person possesses a record indicating a drug-related transaction;

(3) The counterfeit substance is separated and packaged in a manner to facilitate delivery;

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the counterfeit substance;

(5) The person possesses at least two (2) other controlled substances or counterfeit substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a counterfeit substance.

(b) Any person who violates this section with respect to:

(1) A counterfeit substance purporting to be a Schedule I or Schedule II controlled substance upon conviction is guilty of a Class C felony;

(2) A counterfeit substance purporting to be a Schedule III controlled substance upon conviction is guilty of a Class D felony; or

(3) A counterfeit substance purporting to be a Schedule IV, Schedule V, or Schedule VI controlled substance or that is not classified as a scheduled controlled substance upon conviction is guilty of a Class A misdemeanor.

History. Acts 2011, No. 570, § 62; 2013, No. 529, § 5; 2013, No. 1125, § 14.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2013 amendment by No. 529 amended the section heading by adding "Possession with the purpose to deliver"; in (a), added "possess with the purpose to deliver," "Purpose to deliver may be shown by any of the following factors" in the introductory language, and added (1) through (6).

The 2013 amendment by No. 1125 substituted "IV, Schedule V, or Schedule VI" for "IV-VI" in (b)(3).

5-64-443. Drug paraphernalia.

(a) A person who possesses drug paraphernalia with the purpose to use the drug paraphernalia to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter upon conviction is guilty of:

(1) A Class A misdemeanor; or

(2) A Class D felony if the controlled substance is methamphetamine or cocaine.

(b) A person who uses or possesses with the purpose to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance that is methamphetamine or cocaine upon conviction is guilty of a Class B felony.

(c) A person who uses or possesses with the purpose to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, or conceal a controlled substance that is not methamphetamine or cocaine upon conviction is guilty of a Class D felony.

History. Acts 2011, No. 570, § 63.
A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-444. Drug paraphernalia — Delivery to a minor.

(a) A person eighteen (18) years of age or older who violates § 5-64-443 by delivering drug paraphernalia in the course of and in furtherance of a felony violation of this chapter to a person under eighteen (18) years of age who is at least three (3) years younger than the person upon conviction is guilty of a Class B felony.

(b) Otherwise, a person eighteen (18) years of age or older who violates § 5-64-443 by delivering drug paraphernalia to a person under eighteen (18) years of age who is at least three (3) years younger than the person upon conviction is guilty of a Class A misdemeanor.

History. Acts 2011, No. 570, § 64.
A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-445. Advertisement of a counterfeit substance or drug paraphernalia.

A person who places in any newspaper, magazine, handbill, or other publication any advertisement knowing, or under circumstances in which a person reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of a counterfeit substance or of an object designed or intended for use as drug paraphernalia upon conviction is guilty of a Class C felony.

History. Acts 2011, No. 570, § 65.
A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

5-64-446. Civil or criminal liability.

(a) Civil or criminal liability shall not be imposed by this chapter on any practitioner who manufactures, distributes, or possesses a counterfeit substance for use by a practitioner in the course of professional practice or research or for use as a placebo by a practitioner in the course of professional practice or research.

(b)(1) A person who violates §§ 5-64-419 — 5-64-442 is liable for the cost of the cleanup of the site where the person:

(A) Manufactured a controlled substance; or

(B) Possessed drug paraphernalia or a chemical for the purpose of manufacturing a controlled substance.

(2) The person shall make restitution to the state or local agency responsible for the cleanup for the cost of the cleanup under § 5-4-205.

History. Acts 2011, No. 570, § 66.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Subchapter 5 — Uniform Controlled Substances Act — Enforcement and Administration

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Effective Dates. Acts 2007, No. 830, § 2: July 1, 2007. Emergency clause provides: "It is found and determined by the General Assembly of the State of Arkansas that the provisions of this act are needed to comply with the federal regulation sharing program; that this act will allow consistent application of the federal regulation sharing program and avoid confusion if it becomes effective on July 1, 2007; and that this act is immediately necessary because unless the emergency clause is adopted, the act will not go into effect until after the beginning of the next fiscal year. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2007."

5-64-505. Property subject to forfeiture — Procedure — Disposition of property.

(a) Items Subject to Forfeiture. The following are subject to forfeiture upon the initiation of a civil proceeding filed by the prosecuting attorney and when so ordered by the circuit court in accordance with this section, however no property is subject to forfeiture based solely upon a misdemeanor possession of a Schedule III, Schedule IV, Schedule V, or Schedule VI controlled substance:

(1) Any controlled substance or counterfeit substance that has been manufactured, distributed, dispensed, or acquired in violation of this chapter;

(2) Any raw material, product, or equipment of any kind that is used, or intended for use, in manufacturing, compounding, processing, deliv-

ering, importing, or exporting any controlled substance or counterfeit substance in violation of this chapter;

(3) Any property that is used, or intended for use, as a container for property described in subdivision (a)(1) or (2) of this section;

(4) Any conveyance, including an aircraft, vehicle, or vessel that is used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale or receipt of property described in subdivisions (a)(1) or (a)(2) of this section, however:

(A) No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;

(B)(i) No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner of the conveyance to have been committed or omitted without his or her knowledge or consent.

(ii) Upon a showing described in subdivision (a)(4)(B)(i) of this section by the owner or interest holder, the conveyance may nevertheless be forfeited if the prosecuting attorney establishes that the owner or interest holder either knew or should reasonably have known that the conveyance would be used to transport or in any manner to facilitate the transportation for the purpose of sale or receipt of property described in subdivisions (a)(1) or (a)(2) of this section;

(C) A conveyance is not subject to forfeiture for a violation of §§ 5-64-419 and 5-64-441; and

(D) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission;

(5) Any book, record, or research product or material, including a formula, microfilm, tape, or data that is used, or intended for use, in violation of this chapter;

(6)(A) Anything of value, including firearms, furnished or intended to be furnished in exchange for a controlled substance or counterfeit substance in violation of this chapter, any proceeds or profits traceable to the exchange, and any money, negotiable instrument, or security used, or intended to be used, to facilitate any violation of this chapter.

(B) However, no property shall be forfeited under this subdivision (a)(6) to the extent of the interest of an owner by reason of any act or omission established by him or her, by a preponderance of the evidence, to have been committed or omitted without his or her knowledge or consent;

(7) Rebuttable Presumptions.

(A) Any money, coin, currency, or firearms found in close proximity to a forfeitable controlled substance, a counterfeit substance, forfeit-

able drug manufacturing or distributing paraphernalia, or a forfeitable record of an importation, manufacture, or distribution of a controlled substance or counterfeit substance is presumed to be forfeitable under this subdivision (a)(7).

(B) The burden of proof is upon a claimant of the property to rebut this presumption by a preponderance of the evidence; and

(8) Real property may be forfeited under this chapter if it substantially assisted in, facilitated in any manner, or was used or intended for use in the commission of any act prohibited by this chapter, however:

(A) No real property is subject to forfeiture under this chapter by reason of any act or omission established by the owner of the real property by a preponderance of the evidence to have been committed or omitted without his or her knowledge or consent;

(B) Real property is not subject to forfeiture for a violation of § 5-64-419, if the offense is a Class C felony or less, or § 5-64-441;

(C) A forfeiture of real property encumbered by a mortgage or other lien is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the unlawful act or omission;

(D) Upon conviction, when the circuit court having jurisdiction over the real property seized finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under this section, the court shall enter an order consistent with subsection (h) of this section;

(E) When any court orders a forfeiture of real property under this chapter, the order shall be filed of record on the day issued and shall have prospective effect only;

(F) A forfeiture of real property ordered under a provision of this chapter does not affect the title of a bona fide purchaser who purchased the real property prior to the issuance of the order, and the order has no force or effect on the title of the bona fide purchaser; and

(G) Any lis pendens filed in connection with any action pending under a provision of this chapter that might result in the forfeiture of real property is operative only from the time filed and has no retroactive effect.

(b) Seizure and Summary Forfeiture of Contraband. The following items are deemed contraband and may be seized and summarily forfeited to the state:

(1) A controlled substance listed in Schedule I that is possessed, transferred, sold, or offered for sale in violation of this chapter and a controlled substance listed in Schedule I that is seized or comes into the possession of the state and the owner of the controlled substance is unknown;

(2)(A) A species of a plant from which a controlled substance in Schedule I, Schedule II, or Schedule VI may be derived and:

(i) The plant has been planted or cultivated in violation of this chapter;

(ii) The plant's owner or cultivator is unknown; or

(iii) The plant is a wild growth.

(B) Upon demand by a seizing law enforcement agency, the failure of a person in occupancy or in control of land or premises where the species of plant is growing or being stored, to produce an appropriate registration or proof that he or she is the holder of an appropriate registration, constitutes authority for the seizure and forfeiture of the plant; and

(3) Any drug paraphernalia or counterfeit substance except in the possession or control of a practitioner in the course of professional practice or research.

(c) Seizure of Property. Property subject to forfeiture under this chapter may be seized by any law enforcement agent upon process issued by any circuit court having jurisdiction over the property on petition filed by the prosecuting attorney of the judicial circuit. Seizure without process may be made if:

(1) The seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

(3) The seizing law enforcement agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) The seizing law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(d) Transfer of Property Seized by State or Local Agency to Federal Agency.

(1) No state or local law enforcement agency may transfer any property seized by the state or local agency to any federal entity for forfeiture under federal law unless the circuit court having jurisdiction over the property enters an order, upon petition by the prosecuting attorney, authorizing the property to be transferred to the federal entity.

(2) The transfer shall not be approved unless it reasonably appears that the activity giving rise to the investigation or seizure involves more than one (1) state or the nature of the investigation or seizure would be better pursued under federal law.

(e) Custody of Property Pending Disposition.

(1) Property seized for forfeiture under this section is not subject to replevin, but is deemed to be in the custody of the seizing law enforcement agency subject only to an order or decree of the circuit court having jurisdiction over the property seized.

(2) Subject to any need to retain the property as evidence, when property is seized under this chapter the seizing law enforcement agency may:

(A) Remove the property to a place designated by the circuit court;

(B) Place the property under constructive seizure posting notice of pending forfeiture on it, by giving notice of pending forfeiture to its

owners and interest holders, or by filing notice of pending forfeiture in any appropriate public record relating to the property;

(C) Remove the property to a storage area for safekeeping or, if the property is a negotiable instrument or money, or is not needed for evidentiary purposes, deposit it in an interest-bearing account; or

(D) Provide for another agency or custodian, including an owner, secured party, mortgagee, or lienholder, to take custody of the property and service, maintain, and operate it as reasonably necessary to maintain its value in any appropriate location within the jurisdiction of the court.

(3)(A) In any case of transfer of property, a transfer receipt shall be prepared by the transferring agency.

(B) The transfer receipt shall:

(i) List a detailed and complete description of the property being transferred;

(ii) State to whom the property is being transferred and the source or authorization for the transfer; and

(iii) Be signed by both the transferor and the transferee.

(C) Both transferor and transferee shall maintain a copy of the transfer receipt.

(4) A person who acts as custodian of property under this section is not liable to any person on account of an act done in a reasonable manner in compliance with an order under this chapter.

(f) Inventory of Property Seized — Referral to Prosecuting Attorney.

(1) Any property seized by a state or local law enforcement officer who is detached to, deputized or commissioned by, or working in conjunction with a federal agency remains subject to the provisions of this section.

(2)(A) When property is seized for forfeiture by a law enforcement agency, the seizing law enforcement officer shall prepare and sign a confiscation report.

(B)(i) The party from whom the property is seized shall also sign the confiscation report if present and shall immediately receive a copy of the confiscation report.

(ii) If the party refuses to sign the confiscation report, the confiscation report shall be signed by one (1) additional law enforcement officer, stating that the party refused to sign the confiscation report.

(C) The original confiscation report shall be:

(i) Filed with the seizing law enforcement agency within forty-eight (48) hours after the seizure; and

(ii) Maintained in a separate file.

(D) One (1) copy of the confiscation report shall be retained by the seizing law enforcement officer.

(3) The confiscation report shall contain the following information:

(A) A detailed description of the property seized including any serial or model numbers and odometer or hour reading of vehicles or equipment;

(B) The date of seizure;

(C) The name and address from whom the property was seized;

(D) The reason for the seizure;

(E) Where the property will be held;

(F) The seizing law enforcement officer's name; and

(G) A signed statement by the seizing law enforcement officer stating that the confiscation report is true and complete.

(4) Within three (3) business days of receiving the confiscation report, the seizing law enforcement agency shall forward a copy of the confiscation report to the prosecuting attorney for the district where the property was seized and to the Arkansas Drug Director.

(5)(A) The Division of Legislative Audit shall notify the Arkansas Alcohol and Drug Abuse Coordinating Council and a circuit court in the county of a law enforcement agency, prosecuting attorney, or other public entity that the law enforcement agency, prosecuting attorney, or public entity is ineligible to receive any forfeited funds, forfeited property, or any grants from the council, if the Division of Legislative Audit determines, by its own investigation or upon written notice from the Arkansas Drug Director, that:

(i) The law enforcement agency has failed to complete and file the confiscation reports as required by this section;

(ii) The law enforcement agency, prosecuting attorney, or public entity has not properly accounted for any seized property; or

(iii) The prosecuting attorney has failed to comply with the notification requirement set forth in subdivision (i)(1) of this section.

(B) After the notice, the circuit court shall not issue any order distributing seized property to that law enforcement agency, prosecuting attorney, or public entity nor shall any grant be awarded by the council to that law enforcement agency, prosecuting attorney, or public entity until:

(i) The appropriate officials of the law enforcement agency, prosecuting attorney, or public entity have appeared before the Legislative Joint Auditing Committee; and

(ii) The Legislative Joint Auditing Committee has adopted a motion authorizing subsequent transfers of forfeited property to the law enforcement agency, prosecuting attorney, or public entity.

(C)(i) While a law enforcement agency, prosecuting attorney, or other public entity is ineligible to receive forfeited property, the circuit court shall order any money that would have been distributed to that law enforcement agency, prosecuting attorney, or public entity to be transmitted to the Treasurer of State for deposit into the Crime Lab Equipment Fund.

(ii) If the property is other than cash, the circuit court shall order the property converted to cash pursuant to subdivision (h)(1)(B) of this section and the proceeds transmitted to the Treasurer of State for deposit into the Crime Lab Equipment Fund.

(D) Moneys deposited into the Crime Lab Equipment Fund pursuant to subdivision (f)(5)(B) of this section are not subject to recovery or retrieval by the ineligible law enforcement agency, prosecuting attorney, or other public entity.

(6) The Arkansas Drug Director shall establish through rules and regulations a standardized confiscation report form to be used by all law enforcement agencies with specific instructions and guidelines concerning the nature and dollar value of all property, including firearms, to be included in the confiscation report and forwarded to the office of the local prosecuting attorney and the Arkansas Drug Director under this subsection.

(g) Initiation of Forfeiture Proceedings — Notice to Claimants — Judicial Proceedings.

(1)(A) The prosecuting attorney shall initiate forfeiture proceedings by filing a complaint with the circuit clerk of the county where the property was seized and by serving the complaint on all known owners and interest holders of the seized property in accordance with the Arkansas Rules of Civil Procedure.

(B) The complaint may be based on in rem or in personam jurisdiction but shall not be filed in such a way as to avoid the distribution requirements set forth in subdivision (i)(1) of this section.

(C) The prosecuting attorney shall mail a copy of the complaint to the Arkansas Drug Director within five (5) calendar days after filing the complaint.

(2)(A) The complaint shall include a copy of the confiscation report and shall be filed within sixty (60) days after receiving a copy of the confiscation report from the seizing law enforcement agency.

(B) In a case involving real property, the complaint shall be filed within sixty (60) days of the defendant's conviction on the charge giving rise to the forfeiture.

(3)(A) The prosecuting attorney may file the complaint after the expiration of the time set forth in subdivision (g)(2) of this section only if the complaint is accompanied by a statement of good cause for the late filing.

(B) However, in no event shall the complaint be filed more than one hundred twenty (120) days after either the date of the seizure or, in a case involving real property, the date of the defendant's conviction.

(C) If the circuit court determines that good cause has not been established, the circuit court shall order that the seized property be returned to the owner or interest holder. In addition, items seized but not subject to forfeiture under this section or subject to disposition pursuant to law or the Arkansas Rules of Criminal Procedure may be ordered returned to the owner or interest holder. If the owner or interest holder cannot be determined, the court may order disposition of the property in accordance with subsection (h) of this section.

(4) Within the time set forth in the Arkansas Rules of Civil Procedure, the owner or interest holder of the seized property shall file with the circuit clerk a verified answer to the complaint that shall include:

(A) A statement describing the seized property and the owner's or interest holder's interest in the seized property, with supporting documents to establish the owner's or interest holder's interest;

(B) A certification by the owner or interest holder stating that he or she has read the verified answer and that it is not filed for any improper purpose;

(C) A statement setting forth any defense to forfeiture; and

(D) The address at which the owner or interest holder will accept mail.

(5)(A) If the owner or interest holder fails to file an answer as required by subdivision (g)(4) of this section, the prosecuting attorney may move for default judgment pursuant to the Arkansas Rules of Civil Procedure.

(B)(i) If a timely answer has been filed, the prosecuting attorney has the burden of proving by a preponderance of the evidence that the seized property should be forfeited.

(ii) After the prosecuting attorney has presented proof under subdivision (g)(5)(B)(i) of this section, any owner or interest holder of the property seized is allowed to present evidence why the seized property should not be forfeited.

(iii)*(a)* If the circuit court determines that grounds for forfeiting the seized property exist and that no defense to forfeiture has been established by the owner or interest holder, the circuit court shall enter an order pursuant to subsection (h) of this section.

(b) However, if the circuit court determines either that the prosecuting attorney has failed to establish that grounds for forfeiting the seized property exist or that the owner or interest holder has established a defense to forfeiture, the court shall order that the seized property be immediately returned to the owner or interest holder.

(h) Final Disposition.

(1) When the circuit court having jurisdiction over the seized property finds upon a hearing by a preponderance of the evidence that grounds for a forfeiture exist under this chapter, the circuit court shall enter an order:

(A) To permit the law enforcement agency or prosecuting attorney to retain the seized property for law enforcement or prosecutorial purposes, subject to the following provisions:

(i)*(a)* Seized property may not be retained for official use for more than two (2) years, unless the circuit court finds that the seized property has been used for law enforcement or prosecutorial purposes and authorizes continued use for those purposes on an annual basis.

(b) At the end of the retention period, the seized property shall be sold as provided in subdivision (h)(1)(B) of this section and:

(1) Eighty percent (80%) of the proceeds shall be deposited into the drug control fund of the retaining law enforcement agency or prosecuting attorney; and

(2) Twenty percent (20%) of the proceeds shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund.

(c)(1) Nothing prohibits the retaining law enforcement agency or prosecuting attorney from selling the retained seized property at any time during the time allowed for retention.

(2) However, the proceeds of the sale shall be distributed as set forth in subdivision (h)(1)(A)(i)(*b*) of this section;

(ii) If the circuit court determines that retained seized property has been used for personal use or by non-law enforcement personnel for non-law enforcement purposes, the circuit court shall order the seized property to be sold pursuant to the provisions of § 5-5-101(e) and (f), and the proceeds shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund;

(iii)*(a)* A drug task force may use forfeited property or money if the circuit court's order specifies that the forfeited property or money is forfeited to the prosecuting attorney, sheriff, chief of police, Department of Arkansas State Police, or Arkansas Highway Police Division of the Arkansas State Highway and Transportation Department.

(b) After the order, the prosecuting attorney, sheriff, chief of police, Department of Arkansas State Police, or Arkansas Highway Police Division shall:

(1) Maintain an inventory of the forfeited property or money;

(2) Be accountable for the forfeited property or money; and

(3) Be subject to the provisions of subdivision (f)(5) of this section with respect to the forfeited property or money;

(iv)*(a)* Any aircraft is forfeited to the office of the Arkansas Drug Director and may only be used for drug eradication or drug interdiction efforts, within the discretion of the Arkansas Drug Director.

(b) However, if the Arkansas Alcohol and Drug Abuse Coordinating Council determines that the aircraft should be sold, the sale shall be conducted pursuant to the provisions of § 5-5-101(e) and (f), and the proceeds of the sale shall be deposited into the Special State Assets Forfeiture Fund;

(v) Any firearm not retained for official use shall be disposed of in accordance with state and federal law; and

(vi) Any controlled substance, plant, drug paraphernalia, or counterfeit substance shall be destroyed pursuant to a court order;

(B)(i) To sell seized property that is not required by law to be destroyed and that is not harmful to the public.

(ii) Seized property described in subdivision (h)(1)(B)(i) of this section shall be sold at a public sale by the retaining law enforcement agency or prosecuting attorney pursuant to the provisions of § 5-5-101(e) and (f); or

(C) To transfer a motor vehicle to a school district for use in a driver education course.

(2) Disposition of forfeited property pursuant to this subsection is subject to the need to retain the forfeited property as evidence in any related proceeding.

(3) Within three (3) business days of the entry of the order, the circuit clerk shall forward to the Arkansas Drug Director copies of the

confiscation report, the circuit court's order, and any other documentation detailing the disposition of the seized property.

(i) Disposition of Moneys Received. Subject to the provisions of subdivision (f)(5) of this section, the proceeds of sales conducted pursuant to subdivision (h)(1)(B) of this section and any moneys forfeited or obtained by judgment or settlement pursuant to this chapter shall be deposited and distributed in the manner set forth in this subsection. Moneys received from a federal forfeiture shall be deposited and distributed pursuant to subdivision (i)(4) of this section.

(1) Asset Forfeiture Fund.

(A) The proceeds of any sale and any moneys forfeited or obtained by judgment or settlement under this chapter shall be deposited into the asset forfeiture fund of the prosecuting attorney and is subject to the following provisions:

(i) If, during a calendar year, the aggregate amount of moneys deposited in the asset forfeiture fund exceeds twenty thousand dollars ($20,000) per county, the prosecuting attorney shall, within fourteen (14) days of that time, notify the circuit judges in the judicial district and the Arkansas Drug Director;

(ii) Subsequent to the notification set forth in subdivision (i)(1)(A)(i) of this section, twenty percent (20%) of the proceeds of any additional sale and any additional moneys forfeited or obtained by judgment or settlement under this chapter in the same calendar year shall be deposited into the State Treasury as special revenues to be credited to the Crime Lab Equipment Fund, and the remainder shall be deposited into the asset forfeiture fund of the prosecuting attorney;

(iii) Failure by the prosecuting attorney to comply with the notification requirement set forth in subdivision (i)(1)(A)(i) of this section renders the prosecuting attorney and any entity eligible to receive forfeited moneys or property from the prosecuting attorney ineligible to receive forfeited moneys or property, except as provided in subdivision (f)(5)(A) of this section; and

(iv) Twenty percent (20%) of any moneys in excess of twenty thousand dollars ($20,000) that have been retained but not reported as required by subdivision (i)(1)(A)(i) of this section are subject to recovery for deposit into the Crime Lab Equipment Fund.

(B) The prosecuting attorney shall administer expenditures from the asset forfeiture fund which is subject to audit by the Division of Legislative Audit. Moneys distributed from the asset forfeiture fund shall only be used for law enforcement and prosecutorial purposes. Moneys in the asset forfeiture fund shall be distributed in the following order:

(i) For satisfaction of any bona fide security interest or lien;

(ii) For payment of any proper expense of the proceeding for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising, and court costs;

(iii) Any balance under two hundred fifty thousand dollars ($250,000) shall be distributed proportionally so as to reflect gener-

ally the contribution of the appropriate local or state law enforcement or prosecutorial agency's participation in any activity that led to the seizure or forfeiture of the property or deposit of moneys under this chapter; and

(iv) Any balance over two hundred fifty thousand dollars ($250,000) shall be forwarded to the Arkansas Drug Director to be transferred to the State Treasury for deposit into the Special State Assets Forfeiture Fund for distribution as provided in subdivision (i)(3) of this section.

(C)(i) For a forfeiture in an amount greater than two hundred and fifty thousand dollars ($250,000) from which expenses are paid for a proceeding for forfeiture and sale under subdivision (i)(1)(B)(ii) of this section an itemized accounting of the expenses shall be delivered to the Arkansas Drug Director within ten (10) calendar days after the distribution of the funds.

(ii) The itemized accounting shall include the expenses paid, to whom paid, and for what purposes the expenses were paid.

(2) Drug Control Fund.

(A)(i) There is created on the books of law enforcement agencies and prosecuting attorneys a drug control fund.

(ii) The drug control fund shall consist of any moneys obtained under subdivision (i)(1) of this section and any other revenue as may be provided by law or ordinance.

(iii) Moneys from the drug control fund may not supplant other local, state, or federal funds.

(iv) Moneys in the drug control fund are appropriated on a continuing basis and are not subject to the Revenue Stabilization Law, § 19-5-101 et seq.

(v) Moneys in the drug control fund shall only be used for law enforcement and prosecutorial purposes.

(vi) The drug control fund is subject to audit by the Division of Legislative Audit.

(B) The law enforcement agencies and prosecuting attorneys shall submit to the Arkansas Drug Director on or before January 1 and July 1 of each year a report detailing any moneys received and expenditure made from the drug control fund during the preceding six-month period.

(3) Special State Assets Forfeiture Fund.

(A) There is created and established on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State a fund to be known as the "Special State Assets Forfeiture Fund".

(B)(i) The Special State Assets Forfeiture Fund shall consist of revenues obtained under subdivision (i)(1)(B)(iv) of this section and any other revenue as may be provided by law.

(ii) Moneys from the Special State Assets Forfeiture Fund may not supplant other local, state, or federal funds.

(C) The Special State Assets Forfeiture Fund is not subject to the provisions of the Revenue Stabilization Law, § 19-5-101 et seq., or

the Special Revenue Fund Account of the State Apportionment Fund, § 19-5-203(b)(2)(A).

(D)(i) The Arkansas Drug Director shall establish through rules and regulations a procedure for proper investment, use, and disposition of state moneys deposited into the Special State Assets Forfeiture Fund in accordance with the intent and purposes of this chapter.

(ii) State moneys in the Special State Assets Forfeiture Fund shall be distributed by the Arkansas Alcohol and Drug Abuse Coordinating Council and shall be distributed for drug interdiction, eradication, education, rehabilitation, the State Crime Laboratory, and drug courts.

(4) Federal forfeitures.

(A)(i)*(a)* Any moneys received by a prosecuting attorney or law enforcement agency from a federal forfeiture shall be deposited and maintained in a separate account.

(b) However, any balance over two hundred fifty thousand dollars ($250,000) shall be distributed as set forth in subdivision (i)(4)(B) of this section.

(ii) No other moneys may be maintained in the account except for any interest income generated by the account.

(iii) Moneys in the account shall only be used for law enforcement and prosecutorial purposes consistent with governing federal law.

(iv) The account is subject to audit by the Division of Legislative Audit.

(B)(i) Any balance over two hundred fifty thousand dollars ($250,000) shall be forwarded to the Department of Arkansas State Police to be transferred to the State Treasury for deposit into the Special State Assets Forfeiture Fund in which it shall be maintained separately and distributed consistent with governing federal law and upon the advice of the Arkansas Alcohol and Drug Abuse Coordinating Council.

(ii) Of the moneys contained in the Special State Assets Forfeiture Fund at the beginning of each fiscal year, no more than:

(a) Twenty-five percent (25%) shall be retained by the Department of Arkansas State Police to be used for law enforcement purposes consistent with governing federal law; and

(b) Sixty-five percent (65%) may be distributed among other state and local law enforcement agencies to be used for law enforcement purposes consistent with federal law.

(iii) With the advice of the Arkansas Alcohol and Drug Abuse Coordinating Council, the Department of Arkansas State Police shall promulgate rules and procedures for the distribution by an allocation formula of moneys set forth in subdivision (i)(4)(B)(ii)(*b*) of this section.

(j) In Personam Proceedings. In personam jurisdiction may be based on a person's presence in the state, or on his or her conduct in the state, as set out in § 16-4-101(C.), and is subject to the following additional provisions:

(1) A temporary restraining order under this section may be entered ex parte on application of the state, upon a showing that:

(A) There is probable cause to believe that the property with respect to which the order is sought is subject to forfeiture under this section; and

(B) Notice of the action would jeopardize the availability of the property for forfeiture;

(2)(A) Notice of the entry of a temporary restraining order and an opportunity for hearing shall be afforded to a person known to have an interest in the property.

(B) The hearing shall be held at the earliest possible date consistent with Rule 65 of the Arkansas Rules of Civil Procedure and is limited to the issues of whether:

(i) There is a probability that the state will prevail on the issue of forfeiture and that failure to enter the temporary restraining order will result in the property being destroyed, conveyed, alienated, encumbered, disposed of, received, removed from the jurisdiction of the circuit court, concealed, or otherwise made unavailable for forfeiture; and

(ii) The need to preserve the availability of property through the entry of the requested temporary restraining order outweighs the hardship on any owner or interest holder against whom the temporary restraining order is to be entered;

(3) The state has the burden of proof by a preponderance of the evidence to show that the defendant's property is subject to forfeiture;

(4)(A) On a determination of liability of a person for conduct giving rise to forfeiture under this section, the circuit court shall enter a judgment of forfeiture of the property subject to forfeiture as alleged in the complaint and may authorize the prosecuting attorney or any law enforcement officer to seize any property subject to forfeiture pursuant to subsection (a) of this section not previously seized or not then under seizure.

(B) The order of forfeiture shall be consistent with subsection (h) of this section.

(C) In connection with the judgment, on application of the state, the circuit court may enter any appropriate order to protect the interest of the state in property ordered forfeited; and

(5) Subsequent to the finding of liability and order of forfeiture, the following procedures apply:

(A) The attorney for the state shall give notice of pending forfeiture, in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure, to any owner or interest holder who has not previously been given notice;

(B) An owner of or interest holder in property that has been ordered forfeited and whose claim is not precluded may file a claim within thirty (30) days after initial notice of pending forfeiture or after notice under Rule 4 of the Arkansas Rules of Civil Procedure, whichever is earlier; and

(C) The circuit court may amend the in personam order of forfeiture if the circuit court determines that a claimant has established that he or she has an interest in the property and that the interest is exempt under subdivision (a)(4), (6), or (8) of this section.

(k) The circuit court shall order the forfeiture of any other property of a claimant or defendant up to the value of the claimant's or defendant's property found by the circuit court to be subject to forfeiture under subsection (a) of this section if any of the forfeitable property had remained under the control or custody of the claimant or defendant and:

(1) Cannot be located;

(2) Was transferred or conveyed to, sold to, or deposited with a third party;

(3) Is beyond the jurisdiction of the circuit court;

(4) Was substantially diminished in value while not in the actual physical custody of the seizing law enforcement agency;

(5) Was commingled with other property that cannot be divided without difficulty; or

(6) Is subject to any interest exempted from forfeiture under this subchapter.

(*l*)(1)(A) On the fifth day of each month the Treasurer of State shall transfer to the Department of Community Correction Fund Account twenty percent (20%) of any moneys deposited into the Special State Asset Forfeiture Fund during the previous month.

(B) However, in no event shall more than eight hundred thousand dollars ($800,000) be transferred during any one (1) fiscal year.

(2) Any moneys transferred to the Department of Community Correction Fund Account from the Special State Asset Forfeiture Fund in accordance with this subsection shall:

(A) Be used for the personal services and operating expenses of the drug courts and for no other purpose; and

(B) Not be transferred from the Department of Community Correction Fund Account.

History. Acts 1971, No. 590, Art. 5, § 5; 1977, No. 334, § 1; 1981, No. 78, § 3; 1981, No. 863, §§ 1, 2; 1983, No. 787, §§ 7, 8; 1985, No. 1074, § 1; A.S.A. 1947, § 82-2629; Acts 1989, No. 252, §§ 1, 2; 1989 (3rd Ex. Sess.), No. 87, §§ 1, 2, 4; 1991, No. 573, § 1; 1991, No. 1050, § 1; 1999, No. 1120, § 2; 2001, No. 1495, § 2; 2001, No. 1690, §§ 1, 2; 2003, No. 1447, § 1; 2005, No. 1994, § 310; 2005, No. 2245, § 1; 2007, No. 493, §§ 1, 2, 3; No. 827, § 65; No. 830, § 1; 2009, No. 699, § 1; 2011, No. 570, §§ 67, 68.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2009 amendment substituted "owner's or interest holder's" for "petitioner's" twice in (g)(4)(A), and substituted "verified answer" for "document" in (g)(4)(B).

The 2011 amendment substituted "subdivisions (a)(1) or (a)(2)" for "subdivision (a)(1) or (2)" in (a)(4) and (a)(4)(B)(ii); substituted "§§ 5-64-419 and 5-64-441" for "§ 5-64-401(c)" in (a)(4)(C); and substituted "§ 5-64-419, if the offense is a Class C felony or less, or § 5-64-441" for "§ 5-64-401(c)" in (a)(8)(B).

RESEARCH REFERENCES

ALR. Evidence Considered in Tracing Currency, Bank Account, or Cash Equivalent to Illegal Drug Trafficking so as to Permit Forfeiture, or Declaration as Contraband, Under State Law — Amount and Packaging of Money and Drugs. 34 A.L.R.6th 539.

Ark. L. Rev. Recent Developments: Forfeiture — "Close Proximity" Test, 59 Ark. L. Rev. 511.

U. Ark. Little Rock L. Rev. Annual Survey of Caselaw, Property Law, 26 U. Ark. Little Rock L. Rev. 965.

CASE NOTES

Analysis

Construction.
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Requirements.
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Verification.

Construction.

Fact that a controlled substance is residue, rather than a "usable amount," does not make the rebuttable presumption in subdivision (a)(6) of this section inapplicable. $ 15,956 in United States Currency v. State, 366 Ark. 70, 233 S.W.3d 598 (2006).

Because the forfeiture statute is penal in nature, and forfeitures are not favorites of the law, the statute is construed narrowly on appeal. Ridenhour v. State, 98 Ark. App. 116, 250 S.W.3d 566 (2007).

Close Proximity.

Forfeiture of a large amount of cash found in a vehicle was proper as the rebuttable presumption in subdivision (a)(6) of this section applied, even though only residue of a controlled substances was found; moreover, the cash was in close proximity to drugs found in a second vehicle that was traveling in tandem. $ 15,956 in United States Currency v. State, 366 Ark. 70, 233 S.W.3d 598 (2006).

Forfeiture of firearms that were seized during a search of defendant's house with respect to the manufacture of methamphetamine was proper under this section, as the evidence supported the conclusion that all of the firearms were "in close proximity" to the drug paraphernalia. In re Gaucha-Iga 12 Gauge, 2011 Ark. App. 591, — S.W.3d — (2011).

Conveyances.

While a map in defendant's truck did not establish that the truck was used to transport marijuana in violation of subdivision (a)(4) of this section, because defendant's car smelled of raw marijuana and 28 pounds of marijuana were found in a nearby house, the car was properly forfeited as a "container" under subdivision (a)(4). Trotter v. State, 2011 Ark. App. 696, — S.W.3d — (2011).

Forfeiture Proceeding.

Trial court erred in granting state's motion to strike appellant's motion to dismiss a forfeiture action because the forfeiture action was properly commenced on October 13, 2004, and the record indicated that the confiscation report was received on April 1, 2003, clearly beyond the 60 days required by subdivision (2) of this section. Mitchell v. State, 94 Ark. App. 304, 229 S.W.3d 583 (2006).

Requirements.

Trial court erred in ordering the forfeiture of appellant's truck pursuant to a complaint filed by the State of Arkansas where appellant's mere possession of marijuana did not satisfy the requirements set forth in § 5-64-505(a)(4)(A); the State failed to establish that the truck was being used to transport marijuana for the purpose of sale or receipt. Ridenhour v. State, 98 Ark. App. 116, 250 S.W.3d 566 (2007).

Mere possession of a controlled substance does not satisfy the requirements set forth in the civil forfeiture statute. Ridenhour v. State, 98 Ark. App. 116, 250 S.W.3d 566 (2007).

In a forfeiture proceeding, a claimant failed to present documentation that established her ownership of a scanner and a digital camera in compliance with this

section. However, the state failed to show that a computer was properly forfeited as the only evidence it offered that it was used to buy a controlled substance was inadmissible hearsay. Gregory v. State, 2011 Ark. App. 131, — S.W.3d — (2011).

Seizing Agency.

County sheriff's office, although the seizing agency, was not a party to a forfeiture action brought by a prosecutor under this section, and therefore service by the sheriff on the owners of the property to be forfeited was not deficient under Ark. R. Civ. P. 4(c)(1). State v. Hammame, 102 Ark. App. 87, 282 S.W.3d 278 (2008).

Verification.

Pursuant to Ark. R. Civ. P. 11(a) and subdivision (g)(4) of this section, a party in a civil forfeiture action is required to give a personal verification; therefore, a default judgment was properly entered for the state in a case where an owner's answer was merely signed by his attorney. Solis v. State, 371 Ark. 590, 269 S.W.3d 352 (2007).

Ark. R. Civ. P. 4(b) lays out with great specificity the requirements for a proper summons, but nowhere does the rule require or even suggest that the summons must describe all of the requirements for a valid answer. Therefore, in a civil forfeiture action, a summons was not invalid because it failed to state the verification requirements for an answer under subdivision (g)(4) of this section. Solis v. State, 371 Ark. 590, 269 S.W.3d 352 (2007).

A state was entitled to a default judgment in its forfeiture proceedings against $1,814 seized from an arrestee in connection with his arrest on two counts of delivery of a controlled substance because the arrestee's answer was not verified by his signature as required by subdivision (g)(4) of this section, and the arrestee's arguments were the same as those rejected by the court in earlier forfeiture proceedings against the arrestee's truck. Solis v. State, 373 Ark. 255, 283 S.W.3d 190 (2008).

5-64-508. Prevention and deterrence — Educational and research programs.

(a) The Division of Behavioral Health Services shall carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs the division may:

(1) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(2) Assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

(3) Consult with interested groups and organizations to aid them in solving administrative and organizational problems;

(4) Evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;

(5) Disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them; and

(6) Assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

(b) The Division of Behavioral Health Services shall encourage research on misuse and abuse of controlled substances. In connection

with the research, and in furtherance of the enforcement of this chapter, the division may:

(1) Establish methods to assess accurately the effects of controlled substances and identify and characterize those with potential for abuse;

(2) Make studies and undertake programs of research to:

(A) Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this chapter;

(B) Determine patterns of misuse and abuse of controlled substances and the social effects of misuse and abuse of controlled substances; and

(C) Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances; and

(3) Enter into contracts with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects that bear directly on misuse and abuse of controlled substances.

(c) The Division of Behavioral Health Services may enter into contracts for educational and research activities without performance bonds.

(d)(1) The Director of the Department of Health may authorize a person engaged in research on the use and effects of a controlled substance to withhold the names and other identifying characteristics of individuals who are the subjects of the research.

(2) A person who obtains this authorization shall not be compelled in any civil, criminal, administrative, legislative, or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

(e)(1) The Director of the Department of Health may authorize the possession and distribution of a controlled substance by a person engaged in research.

(2) A person who obtains this authorization is exempt from state prosecution for possession and distribution of a controlled substance to the extent of the authorization.

History. Acts 1971, No. 590, Art. 5, § 8; 1979, No. 898, § 15; A.S.A. 1947, § 82-2632; Acts 2005, No. 1994, § 311; 2007, No. 827, § 66; 2013, No. 1107, § 2.

Amendments. The 2013 amendment substituted "Division of Behavioral Health Services" for "Director of the Office of Alcohol and Drug Abuse Prevention" throughout the section; and substituted "the division" for "he or she" in (a) and (b).

5-64-510. Methamphetamine-contaminated motor vehicles.

(a) As used in this section, "methamphetamine-contaminated motor vehicle" means a motor vehicle that has been forfeited under § 5-64-505 in which methamphetamine was manufactured as determined by a law enforcement agency or a prosecuting attorney who has possession of the motor vehicle.

(b) A law enforcement agency or a prosecuting attorney who has possession of a methamphetamine-contaminated motor vehicle shall

destroy or sell for scrap metal the methamphetamine-contaminated motor vehicle.

History. Acts 2009, No. 776, § 1.

Subchapter 7 — Provisions Relating to the Uniform Controlled Substances Act

5-64-707. Admissibility of drug analysis — Cross-examination.

(a) In any criminal prosecution for an alleged violation of this chapter, a record or report of any relevant drug analysis made by the State Crime Laboratory shall be received as competent evidence as to a matter contained in the record or report in this section in any preliminary hearing when attested to by the Executive Director of the State Crime Laboratory or his or her assistant or deputy.

(b)(1) Nothing in this section abrogates a defendant's right of cross-examination.

(2) If the defendant desires to cross-examine the executive director or the appropriate assistant or deputy, the defendant may compel the executive director or his or her appropriate assistant or deputy to attend court by the issuance of a proper subpoena.

(3) If the defendant compels the executive director or his or her appropriate assistant or deputy to attend court by the issuance of a proper subpoena:

(A) The record or report is only admissible through the executive director or the appropriate assistant or deputy; and

(B) The executive director or the appropriate assistant or deputy is subject to cross-examination by the defendant or his or her counsel.

History. Acts 1977, No. 356, § 1; A.S.A. 1947, § 82-2627.1; Acts 2005, No. 1994, § 313.

Publisher's Notes. This section is being set out to reflect a spacing correction in (a).

5-64-710. Denial of driving privileges for minor — Restricted permit.

(a)(1) As used in this section "drug offense" means the:

(A) Possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell, or transfer any substance the possession of which is prohibited under this chapter; or

(B) Operation of a motor vehicle under the influence of any substance the possession of which is prohibited under this chapter.

(2) As used in subdivision (a)(1) of this section:

(A)(i) "Motor vehicle" means any vehicle that is self-propelled by which a person or thing may be transported upon a public highway and is registered in the State of Arkansas or of the type subject to registration in Arkansas.

(ii) "Motor vehicle" includes any:

(a) "Motorcycle", "motor-driven cycle", or "motorized bicycle", as defined in § 27-20-101; and

(b) "Commercial motor vehicle", as defined in § 27-23-103; and

(B) "Substance the possession of which is prohibited under this chapter" or "substance" means a "controlled substance" or "counterfeit substance", as defined in the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802.

(b)(1)(A) When a person who is less than eighteen (18) years of age pleads guilty or nolo contendere to or is found guilty of driving while intoxicated under § 5-65-101 et seq., any criminal offense involving the illegal possession or use of a controlled substance, or any drug offense in this state or any other state, the court having jurisdiction of the matter including any federal court shall prepare and transmit to the Department of Finance and Administration an order of denial of driving privileges for the minor.

(B) A court within the State of Arkansas shall prepare and transmit any order under subdivision (b)(1)(A) of this section to the department within twenty-four (24) hours after the plea or finding.

(C) A court outside Arkansas having jurisdiction over any person holding driving privileges issued by the State of Arkansas shall prepare and transmit any order under subdivision (b)(1)(A) of this section pursuant to an agreement or arrangement entered into between that state and the Director of the Department of Finance and Administration.

(D) An arrangement or agreement under subdivision (b)(1)(C) of this section may also provide for the forwarding by the department of an order issued by a court within this state to the state where any person holds driving privileges issued by that state.

(2) For any person holding driving privileges issued by the State of Arkansas, a court within this state in a case of extreme and unusual hardship may provide in an order for the issuance of a restricted driving permit to allow driving to and from a place of employment or driving to and from school.

(c)(1) Except as provided in subdivision (c)(2) of this section, a penalty prescribed in this section and § 27-16-914 is in addition to any other penalty prescribed by law for an offenses covered by this section and § 27-16-914.

(2) A juvenile adjudicated delinquent is subject to a juvenile disposition provided in § 9-27-330.

(d) In regard to any offense involving illegal possession under this section, it is a defense if the controlled substance is the property of an adult who owns the vehicle.

(e) If a juvenile is found delinquent for any offense described in subsections (a) or (b) of this section, the circuit court may order any juvenile disposition available under § 9-27-330.

History. Acts 1989 (3rd Ex. Sess.), No. 93, §§ 1, 3, 4; 1993, No. 1257, § 1; 2005, No. 1876, § 1; 2005, No. 1994, § 314.

Publisher's Notes. This section is being set out to reflect a correction in the subdivision (a)(2)(A) designation.

Subchapter 8 — Sale of Drug Devices

SECTION.

5-64-801. Definition.

(a) As used in this subchapter, "drug device" means an object usable for smoking marijuana, for smoking a controlled substance defined as a tetrahydrocannabinol, or for ingesting or inhaling cocaine, and includes, but is not limited to:

(1) A metal, wooden, acrylic, glass, stone, plastic, or ceramic pipe with or without a screen, permanent screen, hashish head, or punctured metal bowl;

(2) A water pipe;

(3) A carburetion tube or device;

(4) A smoking or carburetion mask;

(5) A roach clip, meaning an object used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(6) A chamber pipe;

(7) A carburetor pipe;

(8) An electric pipe;

(9) An air-driven pipe;

(10) A chillum;

(11) A bong;

(12) An ice pipe or chiller; and

(13) A miniature cocaine spoon or a cocaine vial.

(b) In any prosecution under this subchapter, the question of whether an object is a drug device is a question of fact.

History. Acts 1981, No. 946, § 1; A.S.A. 1947, § 82-2644.

Publisher's Notes. This section is being set out to correct the text in (a)(3).

5-64-802. Illegal drug paraphernalia business.

CASE NOTES

Arrest Warrant Improper.

Defendant's arrest was illegal because, although there was reasonable cause to believe that defendant committed the offense of owning an illegal drug paraphernalia business, that was a misdemeanor

offense, for which a summons, and not an arrest warrant, should have issued under Ark. R. Crim. P. 7.1(b)(i). There was no information tending to show that defendant would not respond to a summons, the offense of owning a store that sold drug paraphernalia was, in itself, not a violent offense and did not involve the risk of imminent serious bodily injury, and the good-faith exception did not apply because there was no good-faith reliance that an arrest warrant, as opposed to a summons, could be issued for the misdemeanor; therefore, the incriminating evidence obtained as a result of the illegal arrest was the fruit of the poisonous tree. Johnson v. State, 98 Ark. App. 245, 254 S.W.3d 794 (2007).

5-64-803. Public nuisance to be abated or closed.

(a) A place where a drug device is manufactured, sold, stored, possessed, given away, or furnished in violation of this subchapter is deemed a common or public nuisance.

(b) A conveyance or vehicle of any kind is deemed a "place" within the meaning of subsection (a) of this section and may be proceeded against under the provisions of § 5-64-804.

(c) A person who maintains, or aids or abets, or knowingly associates with another in maintaining a common or public nuisance under subsection (a) of this section is in violation of this subchapter, and judgment shall be given that the common or public nuisance be abated or closed as a place for the manufacture, sale, storage, possession, giving away, or furnishing of a drug device.

History. Acts 1981, No. 946, § 1; A.S.A. 1947, § 82-2644; Acts 2007, No. 827, § 67.

Subchapter 10 — Records of Transactions

5-64-1005. Exemptions.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

5-64-1006. Suspicious order reports.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

CASE NOTES

Analysis

Constitutionality.
Application.

Constitutionality.

This section was not impermissibly vague as applied and did not violate the due process guarantee at Ark. Const., Art. II, § 8, because the statute and its supporting regulations were specific enough to provide fair notice that one was required to report to the Arkansas State Board of Pharmacy when one's customers were likely to be using List 1 chemicals to illegally manufacture a controlled substance. Landmark Novelties, Inc. v. Ark. State Bd. of Pharm., 2010 Ark. 40, 358 S.W.3d 890 (2010).

In determining that this section was not impermissibly vague as applied, a vagueness challenge to 21 U.S.C.S. § 830(b)(1)(A), under the similar federal scheme, was instructive in pointing out that a scienter requirement generally saved a statute from unconstitutional vagueness. Landmark Novelties, Inc. v. Ark. State Bd. of Pharm., 2010 Ark. 40, 358 S.W.3d 890 (2010).

Application.

Administrative decision that a distributor violated this section was supported by substantial evidence because, in addition to the nearly 300 transactions with some twenty customers that Appellee Arkansas State Board of Pharmacy identified as involving predominantly listed chemicals, testimony regarding purchases of pseudoephedrine from the distributor was presented at the hearing to support the board's order. Landmark Novelties, Inc. v. Ark. State Bd. of Pharm., 2010 Ark. 40, 358 S.W.3d 890 (2010).

Subchapter 11 — Ephedrine and Other Nonprescription Drugs

Effective Dates. Acts 2013, No. 176, § 2: Mar. 1, 2013. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that military identification cards cannot be entered into the current state tracking system; that because many military personnel in Arkansas are not citizens of the state and do not have a state identification card or driver's license, many military personnel are prohibited from purchasing pseudoephedrine; and that this act is immediately necessary because many military personnel are currently prevented from receiving needed medical treatment. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-64-1101. Possession — Penalty.

(a) It is unlawful for any person to possess more than five grams (5g) of ephedrine or nine grams (9g) of pseudoephedrine or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers, alone or in a mixture, except:

(1) Any pharmacist or other authorized person who sells or furnishes ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers, upon the prescription of a physician, dentist, podiatrist, veterinarian, or other healthcare professional with prescriptive authority, or as authorized pursuant to § 5-64-1103;

(2) A product exempted under § 5-64-1103(b)(1) and (2), without a prescription, pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., or regulations adopted under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., if the person possesses a sales and use tax permit issued by the Department of Finance and Administration;

(3) Any physician, dentist, podiatrist, veterinarian, or other healthcare professional with prescriptive authority who administers or furnishes ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers to his or her patient; or

(4)(A) Any manufacturer, wholesaler, or distributor licensed by the Arkansas State Board of Pharmacy that meets one (1) of the requirements in subdivision (a)(4)(B) of this section and sells, transfers, or otherwise furnishes ephedrine, pseudoephedrine, or phenylpropanolamine or their salts, optical isomers, and salts of optical isomers to:

(i) A licensed pharmacy, physician, dentist, podiatrist, veterinarian, or other healthcare professional with prescriptive authority; or

(ii) Any person who possesses a sales and use tax permit issued by the department.

(B)(i) The manufacturer, wholesaler, or distributor shall hold or store the substance in a facility that meets the packaging requirements of § 5-64-1005(4)(A)-(C).

(ii) The manufacturer, wholesaler, or distributor shall sell, transfer, or otherwise furnish only to a healthcare professional identified in subdivisions (a)(1) and (3) of this section.

(b) Possession of more than five grams (5g) of ephedrine or more than nine grams (9g) of pseudoephedrine or phenylpropanolamine, or their salts, optical isomers, and salts of optical isomers constitutes prima facie evidence of the intent to manufacture methamphetamine or another controlled substance in violation of this subchapter unless the person qualifies for an exemption listed in subsection (a) of this section.

(c) Any person who violates a provision of this section is guilty of a Class D felony.

History. Acts 1997, No. 565, § 1; 2001, No. 1209, § 3; No. 1782, § 1; 2003, No. 867, § 2; 2005, No. 256, § 5.

Publisher's Notes. This section is being set out to reflect a correction in the introductory language of (a).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

CASE NOTES

Analysis

In General.
Construction With Other Law.
Permit.

In General.

To have a sales and use tax permit at a store does not preclude prosecution under this section for possession of more than nine grams of pseudoephedrine away from the store. Spencer v. Langston, — F. Supp.2d —, 2006 U.S. Dist. LEXIS 23349 (E.D. Ark. Apr. 24, 2006).

Construction With Other Law.

Arkansas counties' claims under §§ 5-64-1102 and 16-118-107, failed as a matter of law because their allegations did not show that companies that produced and marketed cold remedies containing ephedrine and pseudoephedrine, which ingredients were used in manufacturing methamphetamine (meth), unlawfully sold, distributed, or dispensed the remedies with reckless disregard as to how they would be used: (1) the counties did not allege that the companies failed to comply with federal law or this section or § 5-64-1103, which regulated the possession and sale of products containing ephedrine or pseudoephedrine; (2) it appeared that this section, rather than § 5-64-1102, applied to the companies because there was nothing in the record showing that the companies distributed their remedies to unlicensed or unregistered entities or that their commercial buyers, which included retailers, intended to use the remedies to manufacture meth; and (3) even if § 5-64-1102 applied, the counties did not offer any example of the companies' alleged reckless behavior beyond their broad assertion that distributing the remedies in their current pharmaceutical formulation was reckless. Independence County v. Pfizer, Inc., 534 F. Supp. 2d 882 (E.D. Ark. 2008), aff'd, Ashley County v. Pfizer, 552 F.3d 659 (8th Cir. 2009).

Permit.

Police captain could reasonably believed that probable cause existed for a warrantless arrest in view of the ambiguity of this section as the only judicial guidance indicated that a person with a sales and use tax permit could be prosecuted for possession of excessive amounts of pseudoephedrine away from a store, and arrestees were transporting an amount of pseudoephedrine in excess of the legal limit for possession away from their place of business; this, combined with advice from the deputy prosecutor before making the arrest, entitled police captain to qualified immunity. Spencer v. Langston, — F. Supp.2d —, 2006 U.S. Dist. LEXIS 23349 (E.D. Ark. Apr. 24, 2006).

5-64-1102. Possession with purpose to manufacture — Unlawful distribution.

(a)(1) It is unlawful for a person to possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, or salts of optical isomers with purpose to manufacture methamphetamine.

(2) A person who violates subdivision (a)(1) of this section upon conviction is guilty of a:

(A) Class D felony if the quantity of substances listed in subdivision (a)(1) of this section is capable of producing ten grams (10g) or less of methamphetamine; or

(B) Class B felony if the quantity of substances listed in subdivision (a)(1) of this section is capable of producing more than ten grams (10g) of methamphetamine.

(b)(1) It is unlawful for a person to possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, optical isomers, or salts of optical isomers in a quantity capable of producing twenty-eight grams (28g) or more of a Schedule I or Schedule II controlled substance that is a narcotic drug or methamphetamine with purpose to manufacture methamphetamine.

(2) A person who violates subdivision (b)(1) of this section upon conviction is guilty of a Class B felony.

(c)(1) It is unlawful for a person to sell, transfer, distribute, or dispense any product containing ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers if the person:

(A) Knows that the purchaser will use the product as a precursor to manufacture methamphetamine or another controlled substance; or

(B) Sells, transfers, distributes, or dispenses the product with reckless disregard as to how the product will be used.

(2) A person who violates subdivision (c)(1) of this section upon conviction is guilty of a Class D felony.

History. Acts 1997, No. 565, § 2; 2001, No. 1209, § 4; 2011, No. 570, § 69.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment substituted "purpose" for "intent" in the section heading and (a)(1); subdivided (a)(2); inserted "upon conviction" in the introductory language of (a)(2) and in (c)(2); inserted "if the quantity ... methamphetamine; or" in (a)(2)(A); inserted (a)(2)(B); added (b) and redesignated former (b) as (c); and substituted "(c)(1)" for "(b)(1)" in (c)(2).

CASE NOTES

Private Actions.

Arkansas counties' claims under this section and § 16-118-107, failed as a matter of law because their allegations did not show that companies that produced and marketed cold remedies containing ephedrine and pseudoephedrine, which ingredients were used in manufacturing methamphetamine (meth), unlawfully sold, distributed, or dispensed the remedies with reckless disregard as to how they would be used: (1) the counties did not allege that the companies failed to comply with federal law or § 5-64-1101 or § 5-64-1103, which regulated the possession and sale of products containing ephedrine or pseudoephedrine; (2) it appeared that § 5-64-1101, rather than this section, applied to the companies because there was nothing in the record showing that the companies distributed their remedies to unlicensed or unregistered entities or that their commercial buyers, which included retailers, intended to use the remedies to manufacture meth; and (3) even if this section applied, the counties did not offer any example of the companies' alleged reckless behavior beyond their broad as-

sertion that distributing the remedies in their current pharmaceutical formulation was reckless. Independence County v. Pfizer, Inc., 534 F. Supp. 2d 882 (E.D. Ark. 2008), aff'd, Ashley County v. Pfizer, 552 F.3d 659 (8th Cir. 2009).

5-64-1103. Sales limits.

(a) It is unlawful for any person, other than a person or entity described in § 5-64-1101(a)(3) and (4), to knowingly sell, transfer, or otherwise furnish in a single transaction a product containing ephedrine, pseudoephedrine, or phenylpropanolamine except in a licensed pharmacy by a licensed pharmacist or a registered pharmacy technician.

(b) Unless the product has been rescheduled pursuant to § 5-64-212(c), this section does not apply to a retail distributor sale for personal use of a product:

(1) That the Department of Health, in collaboration with the Arkansas State Board of Pharmacy, upon application of a manufacturer, exempts by rule from this section because the product has been formulated in such a way as to effectively prevent the conversion of the active ingredient into methamphetamine or its salts or precursors; or

(2) Containing ephedrine or pseudoephedrine in liquid, liquid capsule, or liquid gel capsule form if the drug is dispensed, sold, transferred, or otherwise furnished in a single transaction limited to no more than three (3) packages, with any single package containing not more than ninety-six (96) liquid capsules or liquid gel capsules or not more than three grams (3g) of ephedrine or pseudoephedrine base.

(c)(1)(A) Except under a valid prescription, before dispensing a product containing ephedrine, pseudoephedrine, or phenylpropanolamine that is not exempt under subdivision (b)(1) or (b)(2) of this section, a pharmacist shall make a professional determination based on a pharmacist-patient relationship as to whether or not there is a legitimate medical and pharmaceutical need for the product containing ephedrine, pseudoephedrine, or phenylpropanolamine.

(B) The determination under subdivision (c)(1)(A) of this section may be based on factors including without limitation:

(i) Prior medication-filling history;

(ii) Patient screening; and

(iii) Other tools that provide professional reassurance to the pharmacist that a legitimate medical and pharmaceutical need exists.

(2) The Arkansas State Board of Pharmacy may:

(A) Adopt rules regarding determinations made under subdivision (c)(1) of this section;

(B) Review determinations made under subdivision (c)(1) of this section; and

(C) Take appropriate disciplinary action as required.

(d) Except under a valid prescription, it is unlawful for a licensed pharmacist to dispense or a registered pharmacy technician to knowingly sell, transfer, or otherwise furnish in a single transaction:

(1) More than three (3) packages of one (1) or more products that contain ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers;

(2) Any single package of any product that contains ephedrine, pseudoephedrine, or phenylpropanolamine, that contains more than ninety-six (96) pills, tablets, gelcaps, capsules, or other individual units or more than three grams (3g) of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, or a combination of any of these substances, whichever is smaller;

(3) Any product containing ephedrine, pseudoephedrine, or phenylpropanolamine, unless:

(A) The product is sold in a package size of not more than three grams (3g) of ephedrine, pseudoephedrine, or phenylpropanolamine base and is packaged in a blister pack, each blister containing not more than two (2) dosage units;

(B) When the use of a blister pack is technically infeasible, that is packaged in a unit dose packet or pouch; or

(C) In the case of a liquid, the drug is sold in a package size of not more than three grams (3g) of ephedrine, pseudoephedrine, or phenylpropanolamine base; or

(4)(A) Any product containing ephedrine, pseudoephedrine, or phenylpropanolamine to any person under eighteen (18) years of age, unless the person is purchasing an exempt product under subdivision (b)(1) or (2) of this section.

(B) The person making the sale shall require proof of age from the purchaser.

(e)(1)(A) A person who violates subsections (a) or (d) of this section for a first or second offense upon conviction is guilty of a Class A misdemeanor and also may be subject to a civil fine not to exceed five thousand dollars ($5,000).

(B) A person who violates subsections (a) or (d) of this section for a third offense upon conviction is guilty of a Class D felony and also may be subject to a civil fine not to exceed five thousand dollars ($5,000).

(C) A person who violates subsections (a) or (d) of this section for a fourth or subsequent offense upon conviction is guilty of a Class C felony and also may be subject to a civil fine not to exceed ten thousand dollars ($10,000).

(2) A plea of guilty or nolo contendere to or a finding of guilt under a penal law of the United States or another state that is equivalent to subsections (a) or (d) of this section is considered a previous offense for purposes of this subsection.

(3)(A) The prosecuting attorney may waive any civil penalty under this section if a person establishes that he or she acted in good faith to prevent a violation of this section, and the violation occurred despite the exercise of due diligence.

(B) In making this determination, the prosecuting attorney may consider evidence that an employer trained employees how to sell,

transfer, or otherwise furnish substances specified in this subchapter in accordance with applicable laws.

(f)(1)(A) It is unlawful for any person, other than a person or entity described in § 5-64-1101(a), to knowingly purchase, acquire, or otherwise receive in a single transaction:

(i) More than three (3) packages of one (1) or more products that the person knows to contain ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers; or

(ii) Any single package of any product that the person knows to contain ephedrine, pseudoephedrine, or phenylpropanolamine, that contains more than ninety-six (96) pills, tablets, gelcaps, capsules, or other individual units or more than three grams (3g) of ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers, or a combination of any of these substances, whichever is smaller.

(B) It is unlawful for any person, other than a person or entity described in § 5-64-1101(a), to knowingly purchase, acquire, or otherwise receive more than five grams (5g) of ephedrine or nine grams (9g) of pseudoephedrine or phenylpropanolamine within any thirty-day period.

(2)(A) A person who violates subdivisions (f)(1)(A) or (B) of this section for a first or second offense upon conviction is guilty of a Class A misdemeanor.

(B) A person who violates subdivisions (f)(1)(A) or (B) of this section for a third offense upon conviction is guilty of a Class D felony.

(C) A person who violates subdivisions (f)(1)(A) or (B) of this section for a fourth or subsequent offense upon conviction is guilty of a Class C felony.

(3) A plea of guilty or nolo contendere to or a finding of guilt under a penal law of the United States or another state that is equivalent to subdivisions (f)(1)(A) or (B) of this section is considered a previous offense for the purposes of this subsection.

(g) [Repealed.]

(h) Nothing in this section prohibits a person under eighteen (18) years of age from possessing and selling a product described in subsections (a) and (b) of this section as an agent of the minor's employer acting within the scope of the minor's employment.

History. Acts 2001, No. 1209, § 5; 2003, No. 277, §§ 1, 2; 2005, No. 256, § 6; 2007, No. 508, § 2; 2007, No. 827, §§ 68, 70; 2009, No. 712, §§ 1, 2; 2011, No. 588, §§ 2, 3; 2013, No. 1125, § 15.

A.C.R.C. Notes. The amendments to this section by Acts 2007, No. 508, § 2 are codified in § 5-64-1104.

Amendments. The 2009 amendment inserted (e)(1)(B), (e)(1)(C), (e)(2), (f)(2)(B), (f)(2)(C), and (f)(3) and redesignated the remaining subdivisions accordingly; inserted "for a first or second offense upon conviction" in (e)(1)(A) and (f)(2)(A); and made minor stylistic changes.

The 2011 amendment deleted "dispense" following "knowingly" in (a); added (c) and redesignated the remaining subsections accordingly; and deleted "unless from the purchaser's outward appearance

the person would reasonably presume the purchaser to be twenty-five (25) years of age or older" at the end of (d)(4)(B).

The 2013 amendment substituted "product containing ephedrine, pseudoephedrine, phenylpropanolamine" for "drug" in (c)(1)(A).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

CASE NOTES

Cited: Independence County v. Pfizer, Inc., 534 F. Supp. 2d 882 (E.D. Ark. 2008).

5-64-1104. Sales records — Entering transactions into real-time electronic logbook — Purchaser's proof of identity.

(a) A pharmacy shall:

(1) Maintain a written or electronic log or receipts of transactions involving the sale of ephedrine, pseudoephedrine, or phenylpropanolamine; and

(2) Enter any transaction required to be maintained by this section into the real-time electronic logbook maintained by the Arkansas Crime Information Center under § 5-64-1106.

(b) A person purchasing, receiving, or otherwise acquiring ephedrine, pseudoephedrine, or phenylpropanolamine shall:

(1) Produce current and valid proof of identity; and

(2) Sign a written log or an electronic log or a receipt that documents the date of the transaction, the name of the person, and the quantity of ephedrine, pseudoephedrine, or phenylypropanolamine purchased, received, or otherwise acquired.

(c) The requirements of subsection (a) of this section and subdivision (b)(2) of this section are satisfied by entering the information required to be produced into the real-time electronic logbook maintained by the Arkansas Crime Information Center under § 5-64-1106.

History. Acts 2007, No. 508, § 2; 2007, No. 827, § 69.

A.C.R.C. Notes. Acts 2007, No. 508, § 1, provided: "The General Assembly finds that:

"(a) Act 256 of 2005 requires that sales involving products containing ephedrine, pseudoephedrine, and phenylpropanolamine be recorded into a written or electronic log at each individual pharmacy;

"(b) Since the passage of Act 256 of 2005, the state has experienced a significant decrease in the manufacture of methamphetamine;

"(c) At this time, the state does not have a centralized real-time electronic logbook that can record purchases at a pharmacy of products containing ephedrine, pseudoephedrine, and phenylpropanolamine; and

"(d) In order to assist law enforcement in its efforts to combat methamphetamine, the state needs a centralized real-time electronic logbook to document transactions made at pharmacies that involve the sale of products containing ephedrine, pseudoephedrine, and phenylpropanolamine."

5-64-1105. Definitions.

As used in this subchapter:

(1) "Ephedrine", "pseudoephedrine", and "phenylpropanolamine" means any product containing ephedrine, pseudoephedrine, or phenylpropanolamine or any of their salts, isomers, or salts of isomers, alone or in a mixture;

(2) "Proof of age" and "proof of identity" mean:

(A) A driver's license or identification card issued by the Department of Finance and Administration that contains a photograph of the person, the person's date of birth, and a functioning magnetic stripe or bar code; or

(B) An identification card issued by the United States Department of Defense to active duty military personnel that contains a photograph of the person and the person's date of birth;

(3)(A) "Retail distributor" means a grocery store, general merchandise store, drugstore, convenience store, or other related entity, the activities of which, as a distributor of ephedrine, pseudoephedrine, or phenylpropanolamine products, are limited exclusively to the sale for personal use of ephedrine, pseudoephedrine, or phenylpropanolamine products, both in number of sales and volume of sales, either directly to walk-in customers or in face-to-face transactions by direct sales.

(B) "Retail distributor" includes any person or entity that makes a direct sale or has knowledge of the direct sale.

(C) "Retail distributor" does not include:

(i) Any manager, supervisor, or owner not present and not otherwise aware of the direct sale; or

(ii) The parent company of a grocery store, general merchandise store, drugstore, convenience store, or other related entity if the parent company is not involved in direct sales regulated by this subchapter; and

(4) "Sale for personal use" means the sale in a single transaction to an individual customer for a legitimate medical use of a product containing ephedrine, pseudoephedrine, or phenylpropanolamine in a quantity at or below that specified in § 5-64-1103, and includes the sale of those products to an employer to be dispensed to employees from a first-aid kit or medicine chest.

History. Acts 2007, No. 827, § 71; 2011, No. 588, § 4; 2013, No. 176, § 1.

Amendments. The 2011 amendment rewrote (2).

The 2013 amendment, in (2), inserted (A) designator, deleted "or an identification card issued by the United Stats Department of Defense to active duty military personnel" following "Department of Finance and Administration", and added (B).

5-64-1106. Real-time electronic logbook.

(a)(1) Subject to available funding, on or before May 15, 2008, the Arkansas Crime Information Center shall provide pharmacies in this state access to a real-time electronic logbook for the purpose of entering into the real-time electronic logbook any transaction required to be reported by § 5-64-1104.

(2) The real-time electronic logbook shall have the capability to calculate both state and federal ephedrine, pseudoephedrine, or phenylpropanolamine purchase limitations.

(b) The center may contract with a private vendor to implement this section.

(c) The center shall not charge a pharmacy any fee:

(1) To support the establishment or maintenance of the real-time electronic logbook; or

(2) For any computer software required to be installed as part of the real-time electronic logbook.

History. Acts 2007, No. 508, § 3.

A.C.R.C. Notes. Acts 2007, No. 508, § 1, provided: "The General Assembly finds that:

"(a) Act 256 of 2005 requires that sales involving products containing ephedrine, pseudoephedrine, and phenylpropanolamine be recorded into a written or electronic log at each individual pharmacy;

"(b) Since the passage of Act 256 of 2005, the state has experienced a significant decrease in the manufacture of methamphetamine;

"(c) At this time, the state does not have a centralized real-time electronic logbook that can record purchases at a pharmacy of products containing ephedrine, pseudoephedrine, and phenylpropanolamine; and

"(d) In order to assist law enforcement in its efforts to combat methamphetamine, the state needs a centralized real-time electronic logbook to document transactions made at pharmacies that involve the sale of products containing ephedrine, pseudoephedrine, and phenylpropanolamine."

5-64-1107. Confidentiality of information.

(a) Information entered into the real-time electronic logbook is confidential and is not subject to the Freedom of Information Act of 1967, § 25-19-101 et seq.

(b) Except as authorized under § 5-64-1108 or otherwise by law, the Arkansas Crime Information Center shall not disclose any information entered, collected, recorded, transmitted, or maintained in the real-time electronic logbook.

History. Acts 2007, No. 508, § 3.

A.C.R.C. Notes. Acts 2007, No. 508, § 1, provided: "The General Assembly finds that:

"(a) Act 256 of 2005 requires that sales involving products containing ephedrine, pseudoephedrine, and phenylpropanolamine be recorded into a written or electronic log at each individual pharmacy;

"(b) Since the passage of Act 256 of 2005, the state has experienced a signnificant decrease in the manufacture of methamphetamine;

"(c) At this time, the state does not have a centralized real-time electronic logbook that can record purchases at a pharmacy of products containing ephedrine, pseudoephedrine, and phenylpropanolamine; and

"(d) In order to assist law enforcement in its efforts to combat methamphetamine, the state needs a centralized real-time electronic logbook to document transactions made at pharmacies that involve the sale of products containing ephedrine, pseudoephedrine, and phenylpropanolamine."

5-64-1108. Authorized access to the real-time electronic logbook.

The Arkansas Crime Information Center shall provide access to the real-time electronic logbook to the following:

(1) Any person authorized to prescribe or dispense products containing ephedrine, pseudoephedrine, or phenylpropanolamine for the purpose of providing medical care or pharmaceutical care;

(2) A local, state, or federal law enforcement official or a local, state, or federal prosecutor;

(3) A local, state, or federal official who requests access for the purpose of facilitating a product recall necessary for the protection of the public health and safety; and

(4) The Arkansas State Board of Pharmacy for the purpose of investigating a suspicious transaction, as allowed under § 5-64-1006.

History. Acts 2007, No. 508, § 3.

A.C.R.C. Notes. Acts 2007, No. 508, § 1, provided: "The General Assembly finds that:

"(a) Act 256 of 2005 requires that sales involving products containing ephedrine, pseudoephedrine, and phenylpropanolamine be recorded into a written or electronic log at each individual pharmacy;

"(b) Since the passage of Act 256 of 2005, the state has experienced a significant decrease in the manufacture of methamphetamine;

"(c) At this time, the state does not have a centralized real-time electronic logbook that can record purchases at a pharmacy of products containing ephedrine, pseudoephedrine, and phenylpropanolamine; and

"(d) In order to assist law enforcement in its efforts to combat methamphetamine, the state needs a centralized real-time electronic logbook to document transactions made at pharmacies that involve the sale of products containing ephedrine, pseudoephedrine, and phenylpropanolamine."

5-64-1109. Promulgation of rules.

The Arkansas Crime Information Center, after consulting with the Arkansas State Board of Pharmacy, shall promulgate rules necessary to:

(1) Implement the provisions of §§ 5-64-1104(a)(2) and 5-64-1106 — 5-64-1112;

(2) Ensure that the real-time electronic logbook enables a pharmacy to monitor the sales of ephedrine, pseudoephedrine, or phenylpropanolamine occurring at that pharmacy;

(3) Allow a pharmacy to determine whether it will access information concerning sales of ephedrine, pseudoephedrine, or phenylpropanolamine made at other pharmacies in this state; and

(4) Ensure that the real-time electronic logbook does not allow access to a competitor's pricing information for ephedrine, pseudoephedrine, and phenylpropanalomine.

History. Acts 2007, No. 508, § 3.

A.C.R.C. Notes. Acts 2007, No. 508, § 1, provided: "The General Assembly finds that:

"(a) Act 256 of 2005 requires that sales involving products containing ephedrine, pseudoephedrine, and phenylpropanolamine be recorded into a written or electronic log at each individual pharmacy;

"(b) Since the passage of Act 256 of 2005, the state has experienced a significant decrease in the manufacture of methamphetamine;

"(c) At this time, the state does not have a centralized real-time electronic logbook that can record purchases at a pharmacy of products containing ephedrine, pseudoephedrine, and phenylpropanolamine; and

"(d) In order to assist law enforcement in its efforts to combat methamphetamine, the state needs a centralized real-time electronic logbook to document transactions made at pharmacies that involve the sale of products containing ephedrine, pseudoephedrine, and phenylpropanolamine."

5-64-1110. Destruction of records.

The Arkansas Crime Information Center shall destroy any transaction record maintained in the real-time electronic logbook within two (2) years from the date of its entry unless the transaction record is being used in an ongoing criminal investigation or criminal proceeding.

History. Acts 2007, No. 508, § 3.

A.C.R.C. Notes. Acts 2007, No. 508, § 1, provided: "The General Assembly finds that:

"(a) Act 256 of 2005 requires that sales involving products containing ephedrine, pseudoephedrine, and phenylpropanolamine be recorded into a written or electronic log at each individual pharmacy;

"(b) Since the passage of Act 256 of 2005, the state has experienced a significant decrease in the manufacture of methamphetamine;

"(c) At this time, the state does not have a centralized real-time electronic logbook that can record purchases at a pharmacy of products containing ephedrine, pseudoephedrine, and phenylpropanolamine; and

"(d) In order to assist law enforcement in its efforts to combat methamphetamine, the state needs a centralized real-time electronic logbook to document transactions made at pharmacies that involve the sale of products containing ephedrine, pseudoephedrine, and phenylpropanolamine."

5-64-1111. Liability of pharmacy or pharmacist.

(a) A pharmacy in this state is not liable civilly for a sale of ephedrine, pseudoephedrine, or phenylpropanolamine that occurs at another pharmacy in this state.

(b) A pharmacy or pharmacist is not civilly liable for a determination made under § 5-64-1103(c) or for any refusal to dispense, sell, transfer, or otherwise furnish ephedrine, pseudoephedrine, or phenylpropanolamine based on a determination of age or identity.

History. Acts 2007, No. 508, § 3; 2011, No. 588, § 5.

A.C.R.C. Notes. Acts 2007, No. 508, § 1, provided: "The General Assembly finds that:

"(a) Act 256 of 2005 requires that sales involving products containing ephedrine, pseudoephedrine, and phenylpropanolamine be recorded into a written or electronic log at each individual pharmacy;

"(b) Since the passage of Act 256 of 2005, the state has experienced a significant decrease in the manufacture of meth-

amphetamine;

"(c) At this time, the state does not have a centralized real-time electronic logbook that can record purchases at a pharmacy of products containing ephedrine, pseudoephedrine, and phenylpropanolamine; and

"(d) In order to assist law enforcement in its efforts to combat methamphetamine, the state needs a centralized real-time electronic logbook to document transactions made at pharmacies that involve the sale of products containing ephedrine, pseudoephedrine, and phenylpropanolamine."

Amendments. The 2011 amendment added (b).

5-64-1112. Penalty for unauthorized disclosure and unauthorized access.

(a) A person commits an offense if he or she knowingly:

(1) Releases or discloses to any unauthorized person any confidential information collected and maintained under § 5-64-1107 or § 5-64-1108; or

(2) Obtains confidential information for a purpose not authorized by § 5-64-1107 or § 5-64-1108.

(b) A violation of subsection (a) of this section is a Class A misdemeanor.

History. Acts 2007, No. 508, §, 3.

A.C.R.C. Notes. Acts 2007, No. 508, § 1, provided: "The General Assembly finds that:

"(a) Act 256 of 2005 requires that sales involving products containing ephedrine, pseudoephedrine, and phenylpropanolamine be recorded into a written or electronic log at each individual pharmacy;

"(b) Since the passage of Act 256 of 2005, the state has experienced a significant decrease in the manufacture of methamphetamine;

"(c) At this time, the state does not have a centralized real-time electronic logbook that can record purchases at a pharmacy of products containing ephedrine, pseudoephedrine, and phenylpropanolamine; and

"(d) In order to assist law enforcement in its efforts to combat methamphetamine, the state needs a centralized real-time electronic logbook to document transactions made at pharmacies that involve the sale of products containing ephedrine, pseudoephedrine, and phenylpropanolamine."

5-64-1113. Pharmacist-authorized drugs.

(a) The Arkansas State Board of Pharmacy may adopt rules creating and adding to a list of additional nonprescription drugs that are subject to the same restrictions as are imposed for ephedrine, pseudoephedrine, or phenylpropanolamine under §§ 5-64-1103(c), 5-64-1103(d)(4), and 5-64-1104.

(b) A pharmacy or a pharmacist has the same immunity from civil liability with regard to actions regarding non-prescription drugs under subsection (a) of this section as is provided under § 5-64-1111 for actions concerning ephedrine, pseudoephedrine, or phenylpropanolamine.

History. Acts 2011, No. 588, § 6; 2013, No. 1125, § 16.

Amendments. The 2013 amendment, in (a), inserted "creating and" and "of" and substituted "§§ 5-64-1103(c), 5-64-1103(d)(4), and 5-64-1104" for "§§ 5-64-1103(c) and (d)(4) and § 5-64-1104."

Subchapter 12 — Nitrous Oxide

5-64-1201. Possession.

(a) It is unlawful for any person to possess a substance listed in subsection (b) of this section:

(1) With the intent to breathe, inhale, ingest, or use the substance for the purpose of:

(A) Causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses; or

(B) In any manner changing, distorting, or disturbing his or her audio, visual, or mental processes; or

(2) Who purposely is under the influence of the substance.

(b) This subchapter applies to the following substances:

(1) Nitrous oxide, commonly known as "laughing gas";

(2) Any compound, liquid, or chemical that contains nitrous oxide; or

(3) Any amyl nitrite, commonly known as "poppers" or "snappers".

(c) Upon conviction, a person who violates this section is guilty of a Class A misdemeanor.

History. Acts 1997, No. 355, § 1; 2001, No. 1553, § 13; 2007, No. 827, § 72.

5-64-1202. Distribution.

(a) It is unlawful for any person, firm, corporation, limited liability company, or association to purposely sell, offer for sale, distribute, or give away a substance listed in § 5-64-1201(b) for the purpose of inducing or aiding another person to breathe, inhale, ingest, use, or be under the influence of the substance for a purpose prohibited in § 5-64-1201.

(b) Upon conviction, a person, a firm, a corporation, a limited liability company, or an association that violates this section is guilty of a Class A misdemeanor.

History. Acts 1997, No. 355, § 2; 2001, No. 1553, § 14; 2007, No. 827, § 73.

5-64-1203. Exemptions.

(a) A prohibitive provision in this subchapter does not apply to the possession and use of a substance listed in § 5-64-1201(b) that is prescribed as part of the practice of dentistry or as part of the care or

treatment of a disease, condition, or injury by a licensed physician or to their use as part of a manufacturing process or industrial operation.

(b) A prohibitive provision in this subchapter shall not apply to the possession, use, or sale of nitrous oxide as a propellant in food preparation for restaurant, food service, or a houseware product.

History. Acts 1997, No. 355, § 3; 2007, No. 827, § 74.

CHAPTER 65

DRIVING WHILE INTOXICATED

SUBCHAPTER.

Subchapter 1 — General Provisions

SECTION.

5-65-101. Omnibus DWI Act — Application.

This act shall be known as the "Omnibus DWI Act".

History. Acts 1983, No. 549, § 1; A.S.A. 1947, § 75-2501; 2007, No. 214, § 1.

5-65-102. Definitions.

CASE NOTES

Intoxicated.

If the refusal to be tested is admissible evidence on the issue of intoxication, as defined in subsection (2) of this section, and may indicate the defendant's fear of the results of the test and the consciousness of guilt, then a defendant's attempts to prevent accurate testing surely may be considered as similar proof of guilt; the court's decision does not turn on whether an appellant's efforts to interfere with testing were or could have been successful and even futile efforts to interfere with blood-alcohol testing may be considered as proof of guilt. Blair v. State, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Court rejected defendant's claim of error in the denial of defendant's motion for a directed verdict in her driving while intoxicated (DWI) case, and contrary to defendant's claim, proof of blood-alcohol content, although admissible as evidence tending to prove intoxication, was not necessary to sustain a DWI conviction, as under § 5-65-206(a)(2), a blood alcohol level of more than .04 but less than .08 did not give rise to a presumption of intoxication, but could be considered with other evidence in determining intoxication; based on the eyewitness testimony, defendant's admission to drinking, her blood-alcohol reading, the failure of her field tests, the manner in which she drove the vehicle, and the witnesses' observations regarding her inebriated condition, the jury could have reasonably concluded that she was driving while intoxicated, as defined in subdivision (2) of this section, and (1) the jury could have discounted testimony by defendant's son that he was driving the car, and (2) the fact that defendant was not cited for refusal to submit was of no moment because she did not refuse to submit to testing but instead deliberately delayed an officer in obtaining a successful test result by interfering with the testing. Blair v. State, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Sufficient evidence supported a finding defendant was intoxicated, as defined in subdivision (2) of this section, for purposes of a charge of fourth offense driving while intoxicated, § 5-65-103(a), because defendant was in possession of four bottles of controlled substances at the time of an accident, several witnesses, including a police officer, testified about defendant's substantial impairment immediately after the accident, and defendant had a positive drug screen for a controlled substance. Henry v. State, 2011 Ark. App. 169, 378 S.W.3d 832 (2011).

Sufficient evidence supported defendant's conviction for driving while intoxicated (DWI) under § 5-65-103(a) where the evidence showed that: (1) defendant was driving his car erratically, causing him to leave the highway; (2) defendant was either passed out or unresponsive with his foot still on the accelerator and a tire spinning; (3) the police had to help defendant out of his car, and he was unsteady and unable to walk or stand on his own; (4) a police officer described defendant as being in a daze with slurred speech; (5) defendant's car smelled of marijuana, it contained a partially-smoked joint, and defendant told the police he had been smoking marijuana as well as ingesting large amounts of cold medicine; and (6) defendant testified at trial that he had been smoking marijuana immediately before operating his vehicle that evening. From the evidence presented, the jury could conclude with reasonable certainty that defendant's use of marijuana influenced him to such a degree that he presented a clear and substantial danger of physical injury to himself and others. Morton v. State, 2011 Ark. App. 432, 384 S.W.3d 585 (2011).

Trial court did not err by finding appellant guilty of driving while intoxicated; a positive drug screen, an admission of taking drugs that were known by appellant to be contraindicated with operating a motor vehicle, and observed reckless driving were sufficient evidence to support the fact-finder's conclusion that appellant was intoxicated under this section. Carruth v. State, 2012 Ark. App. 305, — S.W.3d — (2012).

Evidence was sufficient to sustain defendant's conviction for driving while intoxicated because defendant was seen driving erratically, and her urine test came back positive for drugs; the positive drug screen, admission of taking drugs that were known by defendant to be contraindicated with operating a motor vehicle, and the observed reckless driving were sufficient evidence to show defendant was intoxicated. Carruth v. State, — Ark. App. —, — S.W.3d —, 2012 Ark. App. LEXIS 432 (May 2, 2012).

5-65-103. Unlawful acts.

(a) It is unlawful and punishable as provided in this chapter for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.

(b) It is unlawful and punishable as provided in this chapter for any person to operate or be in actual physical control of a motor vehicle if at that time the alcohol concentration in the person's breath or blood was eight-hundredths (0.08) or more based upon the definition of alcohol concentration in § 5-65-204.

History. Acts 1983, No. 549, § 3; A.S.A. 1947, § 75-2503; Acts 2001, No. 561, § 2; 2013, No. 361, § 2.

Amendments. The 2013 amendment substituted "chapter" for "act" in (a) and (b); and substituted "alcohol" for "breath, blood, and urine" in (b).

RESEARCH REFERENCES

ALR. Claim of diabetic reaction or hypoglycemia as defense in prosecution for driving while under influence of alcohol or drugs. 17 A.L.R.6th 757.

CASE NOTES

Analysis

Authority to Arrest.
Burden of Proof.
Elements of Offense.
Evidence.
—Intoxicated.
Instructions.
Intoxicated.
Operation or Control of Vehicle.
Portable Breath Test.
Probable Cause.
Prohibited Conduct.
Right to Counsel.

Authority to Arrest.

After seeing appellant and smelling intoxicants, an officer had the authority to arrest appellant for driving while intoxicated. Ward v. State, 2012 Ark. App. 649, — S.W.3d —, 2012 Ark. App. LEXIS 768 (Nov. 14, 2012).

Burden of Proof.

In a driving while intoxicated case, the state is not required to prove that the defendant confessed or prove that she possessed an intent to drive drunk; contrary to defendant's claim, the state was not required to prove that a law enforcement officer actually witnessed the intoxicated person driving or exercising control over the vehicle, as the state could make that showing by circumstantial evidence. Blair v. State, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Elements of Offense.

Defendant admitted that he had drunk a six-pack of beer prior to his arrest, and the breath-alcohol test results on the Intoximeter indicated that defendant was over the legal limit of alcohol in that the test's final result was .125. In addition to the trooper's observations and defendant's failing three field sobriety tests, this constituted substantial evidence of intoxication to support defendant's conviction for driving while intoxicated. under this section. The state was not obligated to prove that defendant was driving erratically or posed a danger on the road. Graham v. State, 2012 Ark. App. 90, 389 S.W.3d 33 (2012).

Evidence.

Where defendant crossed the center line twice, the state trooper noticed that his breath smelled of alcohol, and he did not pass field-sobriety tests; within two hours of the traffic stop, defendant's breath-test results were more than 0.08. These facts alone were sufficient to support his conviction of driving while intoxicated pursuant to subsection (a) of this section; defendant's claim that his alcohol level would have still been rising at the time of the offense and could have been peaking at the time of the tests was unsupported by the evidence. Hayden v. State, 103 Ark. App. 32, 286 S.W.3d 177 (2008).

If the refusal to be tested is admissible evidence on the issue of intoxication, as defined in § 5-65-102(2), and may indicate the defendant's fear of the results of the test and the consciousness of guilt, then a defendant's attempts to prevent accurate testing surely may be considered

as similar proof of guilt; the court's decision does not turn on whether an appellant's efforts to interfere with testing were or could have been successful and even futile efforts to interfere with blood-alcohol testing may be considered as proof of guilt. Blair v. State, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Court rejected defendant's claim of error in the denial of defendant's motion for a directed verdict in her driving while intoxicated (DWI) case, and contrary to defendant's claim, proof of blood-alcohol content, although admissible as evidence tending to prove intoxication, was not necessary to sustain a DWI conviction, as under § 5-65-206(a)(2), a blood alcohol level of more than .04 but less than .08 did not give rise to a presumption of intoxication, but could be considered with other evidence in determining intoxication; based on the eyewitness testimony, defendant's admission to drinking, her blood-alcohol reading, the failure of her field tests, the manner in which she drove the vehicle, and the witnesses' observations regarding her inebriated condition, the jury could have reasonably concluded that she was driving while intoxicated, as defined in § 5-65-102(2), and (1) the jury could have discounted testimony by defendant's son that he was driving the car, and (2) the fact that defendant was not cited for refusal to submit was of no moment because she did not refuse to submit to testing but instead deliberately delayed an officer in obtaining a successful test result by interfering with the testing. Blair v. State, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

During the penalty phase of defendant's trial for driving while intoxicated in violation of this section and refusal to submit to a chemical test in violation of § 5-65-205, the trial court did not err by admitting evidence of his prior convictions for refusal to submit to a chemical test; the evidence was relevant to his sentencing as either character evidence or aggravating circumstances. Williams v. State, 2009 Ark. App. 554, — S.W.3d — (2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 732 (Oct. 29, 2009).

Directed verdict was not appropriate because the testimony of a trooper that defendant was obviously impaired and that he had observed defendant's vehicle swerve on the highway, along with defendant's admission that he had consumed enough alcohol to register above the legal limit constituted substantial evidence sufficient to sustain defendant's conviction for third-offense driving while intoxicated. Heathman v. State, 2009 Ark. App. 601, — S.W.3d — (2009).

Defendant's arrest was supported by probable cause that he was driving under the influence in violation of subsection (a) of this section, based upon the odor of intoxicants and the performance on the field sobriety test, and a search incident to defendant's arrest was reasonable. In light of reports from citizen-informants, an officer reasonably approached defendant's car to investigate whether defendant was about to drive while intoxicated. Stewart v. State, 2010 Ark. App. 9, 373 S.W.3d 387 (2010).

Sufficient evidence supported a finding defendant was intoxicated, as defined in § 5-65-102(2), for purposes of a charge of fourth offense driving while intoxicated in violation of subsection (a) of this section, because defendant was in possession of four bottles of controlled substances at the time of an accident, several witnesses, including a police officer, testified about defendant's substantial impairment immediately after the accident, and defendant had a positive drug screen for a controlled substance. Henry v. State, 2011 Ark. App. 169, 378 S.W.3d 832 (2011).

While a police officer did not see defendant driving, when the officer arrived at the scene of a reckless-driver call, defendant was slumped over the steering wheel, the motor was running, and a strong odor of alcohol was coming from defendant; thus, the evidence was sufficient to find defendant guilty of driving while intoxicated under this section. Cooley v. State, 2011 Ark. App. 175, — S.W.3d — (2011).

A police officer credibly testified that there was a noticeable odor of alcohol in defendant' car, that defendant was so unsteady on her feet that he was afraid to conduct field-sobriety tests for fear of her falling, and that she told him that she had consumed two beers after taking medication. Therefore, the evidence was sufficient to find her guilty of driving while intoxicated under subsection (a) of this section. Foster v. State, 2012 Ark. App. 640, — S.W.3d —, 2012 Ark. App. LEXIS 741 (Nov. 7, 2012).

There was reasonable cause for defendant's arrest for DWI under this section, because the trooper's observations of defendant's driving, his demeanor, and the odor of alcohol led him to believe that defendant was driving under the influence of intoxicants and was a danger to himself or others. The trooper administered two tests to defendant, both of which registered a blood-alcohol content of .12 percent; therefore, there was substantial evidence to support his DWI conviction. Lewis v. State, 2013 Ark. App. 39, — S.W.3d — (2013).

—Intoxicated.

Defendant's convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women's path, and (4) defendant drove away after the impact. Estacuy v. State, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Instructions.

Trial court did not err in rejecting a DUI defendant's proffered jury instructions because the instructions' omission of any reference to chemical testing or chemical analysis failed to take into account this section's incorporation of § 5-65-204, which describes "the chemical analysis of a person's blood, urine, or breath." The model jury instruction represented a more accurate reflection of the law, although it did not address the 2001 amendment to this section, which had eliminated the phrase "as determined by a chemical test." Graham v. State, 2012 Ark. App. 90, 389 S.W.3d 33 (2012).

Intoxicated.

Sufficient evidence supported defendant's conviction for driving while intoxicated (DWI) under subsection (a) of this section where the evidence showed that: (1) defendant was driving his car erratically, causing him to leave the highway; (2) defendant was either passed out or unresponsive with his foot still on the accelerator and a tire spinning; (3) the police had to help defendant out of his car, and he was unsteady and unable to walk or stand on his own; (4) a police officer described defendant as being in a daze with slurred speech; (5) defendant's car smelled of marijuana, it contained a partially-smoked joint, and defendant told the police he had been smoking marijuana as well as ingesting large amounts of cold medicine; and (6) defendant testified at trial that he had been smoking marijuana immediately before operating his vehicle that evening. From the evidence presented, the jury could conclude with reasonable certainty that defendant's use of marijuana influenced him to such a degree that he presented a clear and substantial danger of physical injury to himself and others. Morton v. State, 2011 Ark. App. 432, 384 S.W.3d 585 (2011).

Operation or Control of Vehicle.

Where evidence showed that, at the time officers encountered defendant in his vehicle, defendant had been drinking, his foot was on the brake pedal, but the keys were not in the ignition as defendant turned off the engine by use of the remote-start button, the state failed to prove that defendant was in "actual physical control" of the vehicle and his conviction for driving while intoxicated was reversed. Rogers v. State, 94 Ark. App. 47, 224 S.W.3d 564 (2006).

Court rejected defendant's claim that the trial court erred in denying defendant's motion for a directed verdict in her driving while intoxicated case; direct eyewitness testimony and circumstantial evidence proved that defendant was the driver, and given that an officer saw the brake light flash on defendant's car before she exited from the driver's side with the keys in her hand, this constituted substantial evidence to establish that defendant was the driver. Blair v. State, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Portable Breath Test.

Court did not err by denying the motion to suppress; officer had reasonable suspicion that defendant was driving while intoxicated before he administered the PBT because defendant admitted he had been drinking, the officer saw defendant driving, and the officer noticed that defendant smelled of intoxicants; there was probable cause to arrest even without consideration of the PBT results because defendant told the officer that he had been drinking, his eyes were bloodshot and

watery, and he smelled of intoxicants and failed two field-sobriety tests. Fisher v. State, 2013 Ark. App. 301, — S.W.3d — (2013).

Probable Cause.

Even if the stop started when the officer knocked on appellant's window, the officer had reasonable suspicion that appellant was endangering other officers on the street, and the officer had authority to require appellant to stop; when the odor of alcohol became apparent, the officer had reasonable suspicion to ask appellant to get out of the vehicle, and as there was probable cause to arrest him for driving while intoxicated, the trial court did not err in denying appellant's motion to suppress. Ward v. State, 2012 Ark. App. 649, — S.W.3d —, 2012 Ark. App. LEXIS 768 (Nov. 14, 2012).

Prohibited Conduct.

Trial court believed an officer's testimony that the encounter was no more than the officer trying to direct traffic and appellant's vehicle on a congested and dark street amidst a crime scene where officers' safety was at issue, and while protecting the officers was a specific explanation for knocking on appellant's window, the odor of intoxicants and his appearance gave the required suspicion for an investigation into a potential driving while intoxicated offense; under Ark. R. Crim. P. 3.1 the officer then had a duty to investigate further because it is unlawful for any person who is intoxicated to operate or be in actual physical contract of a motor vehicle. Ward v. State, 2012 Ark. App. 649, — S.W.3d —, 2012 Ark. App. LEXIS 768 (Nov. 14, 2012).

Right to Counsel.

Notwithstanding Ark. R. Crim. P. 4.5, the Court of Appeals of Arkansas held that defendant had no right to consult with counsel before taking a breathalyzer test following a traffic stop that led to his arrest and conviction for driving while intoxicated in violation of this section. Lewis v. State, 2013 Ark. App. 39, — S.W.3d — (2013).

5-65-104. Seizure, suspension, and revocation of license — Temporary permits — Ignition interlock restricted license.

(a)(1) At the time of arrest for operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood, as provided in § 5-65-103, the arrested person shall immediately surrender his or her license, permit, or other evidence of driving privilege to the arresting law enforcement officer as provided in § 5-65-402.

(2) The Office of Driver Services or its designated official shall suspend or revoke the driving privilege of an arrested person or shall suspend any nonresident driving privilege of an arrested person, as provided in § 5-65-402. The suspension or revocation shall be based on the number of previous offenses as follows:

(A) Suspension for:

(i)*(a)* Six (6) months for the first offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of at least eight hundredths (0.08) by weight of alcohol in the person's blood or breath, § 5-65-103.

(b) If the Office of Driver Services allows the issuance of an ignition interlock restricted license under § 5-65-118, the ignition interlock restricted license shall be available immediately.

(c) The restricted driving permit under § 5-65-120 is not allowed for a suspension under this subdivision (a)(2)(A)(i); and

(ii)*(a)* Suspension for six (6) months for the first offense of operating or being in actual physical control of a motor vehicle while intoxicated by the ingestion of or by the use of a controlled substance.

(b) The ignition interlock restricted license provision of § 5-65-118 does not apply to a suspension under subdivision (a)(2)(A)(ii)*(a)* of this section;

(B)(i) Suspension for twenty-four (24) months for a second offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more by weight of alcohol in the person's blood or breath, § 5-65-103, within five (5) years of the first offense.

(ii) However, if the office allows the issuance of an ignition interlock restricted license under § 5-65-118, the restricted license is available immediately.

(iii) The ignition interlock restricted license provision of § 5-65-118 does not apply to the suspension under subdivisions (a)(2)(B)(i) and (ii) of this section if the person is arrested for an offense of operating or being in actual physical control of a motor vehicle while intoxicated by the ingestion of or by the use of a controlled substance;

(C)(i) Suspension for thirty (30) months for the third offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more by weight of alcohol in the person's blood or breath, § 5-65-103, within five (5) years of the first offense.

(ii) However, if the office allows the issuance of an ignition interlock restricted license under § 5-65-118, the restricted license is available immediately.

(iii) The ignition interlock restricted license provision of § 5-65-118 does not apply to the suspension under subdivisions (a)(2)(C)(i) and (ii) if the person is arrested for an offense of operating or being in actual physical control of a motor vehicle while intoxicated by the ingestion of or by the use of a controlled substance; and

(D) Revocation for four (4) years, during which no restricted permits may be issued, for the fourth or subsequent offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more by weight of alcohol in the person's blood or breath, § 5-65-103, within five (5) years of the first offense.

(3) If a person is a resident who is convicted of driving without a license or permit to operate a motor vehicle and the underlying basis for the suspension, revocation, or restriction of the license was for a violation of § 5-65-103, in addition to any other penalties provided for under law, the court may restrict the offender to an ignition interlock restricted license for a period of one (1) year prior to the reinstatement or reissuance of a license or permit after the person would otherwise be eligible for reinstatement or reissuance of the person's license.

(4) In order to determine the number of previous offenses to consider when suspending or revoking the arrested person's driving privileges,

the office shall consider as a previous offense any of the following that occurred within the five (5) years immediately before the current offense:

(A) Any conviction for an offense of operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood, including a violation of § 5-10-105(a)(1)(A) or (B), that occurred:

(i) In Arkansas; or

(ii) In another state;

(B) Any suspension or revocation of driving privileges for an arrest for operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood under § 5-65-103 when the person was not subsequently acquitted of the criminal charges; or

(C) Any conviction under § 5-76-102 for an offense of operating a motorboat on the waters of this state while intoxicated or while there was an alcohol concentration in the person's breath or blood of eight hundredths (0.08) or more based upon the definition of breath, blood, and urine concentration in § 5-65-204 or refusing to submit to a chemical test under § 5-76-104 occurring on or after July 31, 2007, when the person was not subsequently acquitted of the criminal charges.

(b)(1)(A) Any person whose license is suspended or revoked pursuant to this section is required to complete an alcohol education program or an alcohol treatment program as approved by the Office of Alcohol and Drug Abuse Prevention unless the charges are dismissed or the person is acquitted of the charges upon which the suspension or revocation is based.

(B) If during the period of suspension or revocation under subdivision (b)(1)(A) of this section the person commits an additional violation of § 5-65-103, he or she is also required to complete an approved alcohol education program or alcohol treatment program for each additional violation, unless:

(i) The additional charges are dismissed; or

(ii) He or she is acquitted of the additional charges.

(2) A person whose license is suspended or revoked pursuant to this section shall furnish proof of attendance at and completion of the alcohol education program or the alcohol treatment program required under subdivision (b)(1) of this section before reinstatement of his or her suspended or revoked driver's license or shall furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(3) Even if a person has filed a de novo petition for review pursuant to former subsection (c) of this section, the person is entitled to reinstatement of driving privileges upon complying with this subsection and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

History. Acts 1983, No. 549, § 13; 1985, No. 113, § 1; 1985, No. 1064, § 1; A.S.A. 1947, § 75-2511; Acts 1989, No. 368, § 1; 1989, No. 621, § 1; 1993, No. 736, § 1; 1995, No. 802, § 1; 1997, No. 830, § 1; 1997, No. 1325, § 2; 1999, No. 1077, § 9; 1999, No. 1468, § 1; 1999, No. 1508, § 7; 2001, No. 561, §§ 3-5; No. 1501, § 1; 2003, No. 541, § 1; 2003, No. 1036, § 1; 2003, No. 1462, § 1; 2003, No. 1779, § 1; 2005, No. 1234, § 3; 2005, No. 1768, § 1; 2007, No. 712, § 1; 2007, No. 827, § 75; 2007, No. 1196, § 1; 2009, No. 359, §§ 1—3; 2009, No. 650, § 2; 2009, No. 922, § 1; 2009, No. 1293, § 1; 2013, No. 479, §§ 1, 2.

A.C.R.C. Notes. Acts 2007, No. 827, § 75 provided: "Acts 1999, No. 1077, § 9, is repealed due to a conflict between that act and Acts 1999, No. 1468, § 1, and Acts 1999, No. 1508, § 7, in amending § 5-65-104, and which conflict under § 1-2-207 is resolved in favor of Acts 1999, Nos. 1468 and 1508."

Amendments. The 2009 amendment by No. 359, in (a)(2), inserted (a)(2)(A)(ii)(b), redesignated the remainder of (a)(2)(A)(ii) accordingly, added (a)(2)(B)(iii) and (a)(2)(C)(iii), and made related changes.

The 2009 amendment by No. 650 inserted "including a violation of § 5-10-105(a)(1)(A) or (B)" in (a)(4)(A).

The 2009 amendment by No. 922, in (a)(2)(B)(ii), substituted "forty-five (45) days, followed by restricted driving privileges to allow driving in any and all of the following situations" for "one (1) year" and inserted (a)(2)(B)(ii)(a) through (a)(2)(B)(ii)(d); in (a)(2)(C)(ii), substituted "forty-five (45) days, followed by restricted driving privileges to allow driving in any and all of the following situations" for "one (1) year" and inserted (a)(2)(C)(ii)(a) through (a)(2)(C)(ii)(d); and made related changes.

The 2009 amendment by No. 1293 rewrote (a)(2)(A).

The 2013 amendment rewrote (a)(2)(B)(ii) and (a)(2)(C)(ii); and in, (a)(3), substituted "court" for "office" and deleted "only" preceding "an ignition."

CASE NOTES

Cited: Gorman v. State, 366 Ark. 82, 233 S.W.3d 622 (2006).

5-65-105. Operation of motor vehicle during period of license suspension or revocation.

CASE NOTES

Evidence.

Defendant's convictions were supported by substantial evidence where it was shown that (1) shortly after the incident, defendant had a blood-alcohol level of .23 percent, (2) defendant was driving the car that hit two women and narrowly missed a third, (3) just before the impact, defendant was witnessed to speed up and actually swerve the vehicle toward the women's path, and (4) defendant drove away after the impact. Estacuy v. State, 94 Ark. App. 183, 228 S.W.3d 567 (2006).

Trial court did not err in denying defendant's motion to suppress the statement he made to an officer who stopped him admitting that he knew his license was suspended; no Miranda warning was needed because, at the time of the statement, defendant sat in his car on the side of the road, he was never arrested, and after the officer gave him the traffic citation he was free to go. Gorman v. State, 366 Ark. 82, 233 S.W.3d 622 (2006).

Evidence was sufficient for a conviction of driving with a suspended license where defendant admitted to the police officer that had stopped him that he knew his license was suspended and the state produced a certified driving record at trial indicating that defendant's license was suspended for a DWI that had occurred in December 2002. Gorman v. State, 366 Ark. 82, 233 S.W.3d 622 (2006).

5-65-108. No probation prior to adjudication of guilt.

(a) Section 16-93-301 et seq., allows a circuit court judge, district court judge, or city court judge to place on probation a first offender who pleads guilty or nolo contendere prior to an adjudication of guilt.

(b) Upon successful completion of the probation terms, the circuit court judge, district court judge, or city court judge is allowed to discharge the accused without a court adjudication of guilt and expunge the record.

(c)(1) No circuit court judge, district court judge, or city court judge may utilize the provisions of § 16-93-301 et seq. in an instance in which the defendant is charged with violating § 5-65-103.

(2) Notwithstanding the provisions of § 5-4-301, § 5-4-322, or subdivision (c)(1) of this section, in addition to the mandatory penalties required for a violation of § 5-65-103, a circuit court judge, district court judge, or city court judge may utilize probationary supervision solely for the purpose of monitoring compliance with his or her orders and require an offender to pay a reasonable fee in an amount to be established by the circuit court judge, district court judge, or city court judge.

History. Acts 1983, No. 549, § 9; A.S.A. 1947, § 75-2509; Acts 2005, No. 1768, § 2; 2007, No. 827, § 76.

5-65-109. Presentencing report.

(a) The court shall immediately request and the Division of Behavioral Health Services or its designee shall provide a presentence screening and assessment report of the defendant upon a plea of guilty or nolo contendere to or a finding of guilt of violating § 5-65-103 or § 5-65-303.

(b)(1) The presentence report shall be provided within thirty (30) days of the request, and the court shall not pronounce sentence until receipt of the presentence report.

(2)(A) After entry of a plea of guilty or nolo contendere or a finding of guilt and if the sentencing of the defendant is delayed by the defendant, the clerk of the court shall notify the defendant by first class mail sent to the defendant's last known address that the defendant has fifteen (15) days to appear and show cause for failing to appear for sentencing.

(B) After expiration of the fifteen (15) days, the court may proceed with sentencing even in the absence of the defendant.

(c) The report shall include, but not be limited to, the defendant's driving record, an alcohol problem assessment, and a victim impact statement when applicable.

History. Acts 1983, No. 549, § 6; A.S.A. 1947, § 75-2506; Acts 1991, No. 899, § 1; 1999, No. 1077, § 10; 2003, No. 129, § 1; 2007, No. 251, § 1; 2007, No. 827, § 77; 2013, No. 1107, § 3.

Amendments. The 2013 amendment

substituted "Division of Behavioral Health Services" for "Office of Alcohol and Drug Abuse Prevention" in (a).

5-65-111. Prison terms — Exception.

(a)(1)(A) Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103, for a first offense, may be imprisoned for no less than twenty-four (24) hours and no more than one (1) year.

(B) However, the court may order public service in lieu of jail, and in that instance, the court shall include the reasons for the order of public service in lieu of jail in the court's written order or judgment.

(2)(A) However, if a passenger under sixteen (16) years of age was in the vehicle at the time of the offense, a person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103, for a first offense, may be imprisoned for no fewer than seven (7) days and no more than one (1) year.

(B) However, the court may order public service in lieu of jail, and in that instance, the court shall include the reasons for the order of public service in lieu of jail in the court's written order or judgment.

(b) Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 or any other equivalent penal law of another state or foreign jurisdiction shall be imprisoned or shall be ordered to perform public service in lieu of jail as follows:

(1)(A) For no fewer than seven (7) days but no more than one (1) year for the second offense occurring within five (5) years of the first offense or no fewer than thirty (30) days of community service.

(B)(i) However, if a person under sixteen (16) years of age was in the vehicle at the time of the offense, for no fewer than thirty (30) days but no more than one (1) year for the second offense occurring within five (5) years of the first offense or no fewer than sixty (60) days of community service.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service;

(2)(A) For no fewer than ninety (90) days but no more than one (1) year for the third offense occurring within five (5) years of the first offense or no fewer than ninety (90) days of community service.

(B)(i) However, if a person under sixteen (16) years of age was in the vehicle at the time of the offense, for no fewer than one hundred twenty days (120) days but no more than one (1) year for the third offense occurring within five (5) years of the first offense or no fewer than one hundred twenty (120) days of community service.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service;

(3)(A) For at least one (1) year but no more than six (6) years for the fourth offense occurring within five (5) years of the first offense or not less than one (1) year of community service and is guilty of a felony.

(B)(i) However, if a person under sixteen (16) years of age was in the vehicle at the time of the offense, for at least two (2) years but no more than six (6) years for the fourth offense occurring within five (5) years of the first offense or not less than two (2) years of community service and is guilty of a felony.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service; and

(4)(A)(i) Except as provided in § 5-65-122, for at least two (2) years but no more than ten (10) years for the fifth or subsequent offense occurring within five (5) years of the first offense or not less than two (2) years of community service and is guilty of an unclassified felony.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service.

(B)(i) However, if a person under sixteen (16) years of age was in the vehicle at the time of the offense, for at least three (3) years but no more than ten (10) years for the fifth offense occurring within five (5) years of the first offense or not less than three (3) years of community service and is guilty of a felony.

(ii) If the court orders community service, the court shall clearly set forth in written findings the reasons for the order of community service.

(c) For any arrest or offense occurring before July 30, 1999, but that has not reached a final disposition as to judgment in court, the offense shall be decided under the law in effect at the time the offense occurred, and any defendant is subject to the penalty provisions in effect at that time and not under the provisions of this section.

(d) It is an affirmative defense to prosecution under subdivisions (a)(2), (b)(1)(B), (b)(2)(B), (b)(3)(B), and (b)(4)(B) of this section that the person operating or in actual physical control of the motor vehicle was not more than two (2) years older than the passenger.

(e) A prior conviction for § 5-10-105(a)(1)(A) or (B) is considered a previous offense for purposes of subsection (b) of this section.

History. Acts 1983, No. 549, § 4; A.S.A. 1947, § 75-2504; Acts 1997, No. 1236, § 1; 1999, No. 1077, § 11; 2001, No. 1206, § 1; 2003, No. 1461, §§ 1, 2; 2009, No. 650, § 3; 2013, No. 1268, § 1.

Amendments. The 2009 amendment added (e).

The 2013 amendment in (4)(A)(i) substituted "Except as provided in § 5-65-122, for" for "For" and substituted "an unclassified" for "a" preceding "felony."

CASE NOTES

Prior Convictions.

In defendant's bench trial for felony fourth offense driving while intoxicated (DWI), a trial court did not abuse its discretion in allowing the state to reopen its case for the purpose of introducing the omitted proof of defendant's prior DWI convictions because defendant's motion for a directed verdict came at the conclusion of her case, not at the conclusion of

the state's evidence and defendant was neither surprised nor disadvantaged by the trial court's use of a bifurcated procedure. Henry v. State, 2011 Ark. App. 169, 378 S.W.3d 832 (2011).

5-65-112. Fines.

Any person who pleads guilty or nolo contendere to or is found guilty of violating § 5-65-103 shall be fined:

(1) No less than one hundred fifty dollars ($150) and no more than one thousand dollars ($1,000) for the first offense;

(2) No less than four hundred dollars ($400) and no more than three thousand dollars ($3,000) for the second offense occurring within five (5) years of the first offense; and

(3) Except as provided in § 5-65-122, no less than nine hundred dollars ($900) and no more than five thousand dollars ($5,000) for the third or subsequent offense occurring within five (5) years of the first offense.

History. Acts 1983, No. 549, § 5; A.S.A. 1947, § 75-2505; Acts 1993, No. 106, § 1; 1999, No. 1077, § 12; 2013, No. 1268, § 2.

Amendments. The 2013 amendment substituted "Except as provided in § 5-65-122, no" for "No" at the beginning of (3).

5-65-115. Alcohol treatment or education program — Fee.

(a)(1) Any person whose driving privileges are suspended or revoked for violating § 5-65-103, § 5-65-303, § 5-65-310, or § 3-3-203 is required to complete an alcohol education program provided by a contractor with the Division of Behavioral Health Services or an alcoholism treatment program licensed by the Division of Behavioral Health Services.

(2)(A) The alcohol education program may collect a program fee of up to one hundred twenty-five dollars ($125) per enrollee to offset program costs.

(B)(i) A person ordered to complete an alcohol education program under this section may be required to pay, in addition to the costs collected for education or treatment, a fee of up to twenty-five dollars ($25.00) to offset the additional costs associated with reporting requirements under this subchapter.

(ii) The alcohol education program shall report monthly to the Division of Behavioral Health Services all revenue derived from this fee.

(b)(1) A person whose license is suspended or revoked for violating § 5-65-103 shall:

(A) Both:

(i) Furnish proof of attendance at and completion of the alcoholism treatment program or alcohol education program required under § 5-65-104(b)(1) before reinstatement of his or her suspended or revoked driver's license; and

(ii) Pay any fee for reinstatement required under § 5-65-119 or § 5-65-304; or

(B) Furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(2) An application for reinstatement shall be made to the Office of Driver Services.

(c) Even if a person has filed a de novo petition for review pursuant to § 5-65-402, the person is entitled to reinstatement of driving privileges upon complying with this section and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

(d)(1) A person suspended under this act may enroll in an alcohol education program prior to disposition of the offense by the circuit court, district court, or city court.

(2) However, the person is not entitled to any refund of a fee paid if the charges are dismissed or if the person is acquitted of the charges.

(e) Each alcohol education program or alcoholism treatment program shall remit the fees imposed under this section to the Division of Behavioral Health Services.

History. Acts 1983, No. 549, § 7; 1985, No. 108, § 1; A.S.A. 1947, § 75-2507; Acts 1991, No. 486, § 1; 1995, No. 172, § 1; 1995, No. 263, § 1; 1995, No. 1032, § 1; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4; 1999, No. 1077, § 13; 2003, No. 1462, § 2; 2005, No. 1768, § 3; 2007, No. 251, § 2; 2007, No. 827, § 78; 2009, No. 748, § 28; 2013, No. 1107, §§ 4, 5.

A.C.R.C. Notes. Acts 2007, No. 827, § 78 provides: "Acts 1995, No. 172, § 1, and Acts 1995, No. 1032, § 1, are repealed due to a conflict between those acts and Acts 1995, No. 263, § 1, and Acts 1995, No. 1256, § 20, in amending § 5-65-115, and which conflict under § 1-2-207 is resolved in favor of Acts 1995, Nos. 263 and 1256."

Amendments. The 2009 amendment substituted "education program or alcoholism treatment program" for "education or treatment program" in (e).

The 2013 amendment substituted "Division of Behavioral Health Services" for "Office of Alcohol and Drug Abuse Prevention" twice in (a)(1), once in (a)(2)(B)(ii) and (e).

5-65-117. Seizure and sale of motor vehicles.

(a)(1)(A) Any person who pleads guilty or nolo contendere or is found guilty of violating § 5-65-103 for a fourth offense occurring within five (5) years of the first offense, at the discretion of the court, may have his or her motor vehicle seized.

(B) If the motor vehicle is seized, the title to the motor vehicle is forfeited to the state.

(2)(A) If ordered by the court, it is the duty of the sheriff of the county where the offense occurred to seize the motor vehicle.

(B) The court may issue an order directing the sheriff to sell the motor vehicle seized at a public auction to the highest bidder within thirty (30) days from the date of judgment.

(b)(1) The sheriff shall advertise the motor vehicle for sale for a period of two (2) weeks prior to the date of sale by at least one (1) insertion per week in a newspaper having a bona fide circulation in the county.

(2) The notice shall include a brief description of the motor vehicle to be sold and the time, place, and terms of the sale.

(c) The proceeds of the sale of the seized motor vehicle shall be deposited into the county general fund.

(d)(1) After the sheriff has made the sale and has turned over the proceeds of the sale to the county treasurer, the sheriff shall report his or her actions to the court in which the defendant was tried.

(2) The report required by subdivision (d)(1) of this section shall be filed with the court within sixty (60) days from the date of judgment.

(e) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission.

History. Acts 1989 (3rd Ex. Sess.), No. 94, § 1; 2013, No. 412, § 1.

Amendments. The 2013 amendment substituted "five (5) years" for "three (3) years" in (a)(1)(A).

5-65-118. Additional penalties — Ignition interlock devices.

(a)(1)(A)(i) In addition to any other penalty authorized for a violation of this chapter, upon an arrest of a person for violating § 5-65-103 for a first or second offense, the Office of Driver Services may restrict the person to operating only a motor vehicle that is equipped with a functioning ignition interlock device.

(ii) The restriction may continue for a period of up to one (1) year after the person's license is no longer suspended or restricted under the provisions of § 5-65-104.

(B) Upon a finding that a person is financially able to afford an ignition interlock device and upon an arrest for a violation of § 5-65-103 for a third or subsequent offense, the office may restrict the offender to operate only a motor vehicle that is equipped with a functioning ignition interlock device for up to one (1) year after the person's license is no longer suspended or restricted under § 5-65-104.

(2) In accordance with the requirements under the provisions of § 5-65-104, the office may issue an ignition interlock restricted license to the person only after the person has verified installation of a functioning ignition interlock device to the office in any motor vehicle the person intends to operate, except for an exemption allowed under subsection (g) of this section.

(3) The office shall establish:

(A) A specific calibration setting no lower than two hundredths of one percent (0.02%) nor more than five hundredths of one percent (0.05%) of alcohol in the person's blood at which the ignition interlock device will prevent the motor vehicle's being started; and

(B) The period of time that the person is subject to the restriction.

(4) As used in this section, "ignition interlock device" means a device that connects a motor vehicle ignition system to a breath-alcohol analyzer and prevents a motor vehicle ignition from starting if a driver's blood alcohol level exceeds the calibration setting on the device.

(b) Upon restricting the offender to the use of an ignition interlock device, the office shall:

(1)(A) State on the record the requirement for and the period of use of the ignition interlock device.

(B) However, if the office restricts the offender to the use of an ignition interlock device in conjunction with the issuance of an ignition interlock restricted license under a provision of § 5-65-104, the period of requirement of use of the ignition interlock device shall be at least the remaining time period of the original suspension imposed under § 5-65-104;

(2) Ensure that the records of the office reflect that the person may not operate a motor vehicle that is not equipped with an ignition interlock device;

(3) Attach or imprint a notation on the driver's license of any person restricted under this section stating that the person may operate only a motor vehicle equipped with an ignition interlock device;

(4) Require the person restricted under this section to show proof of installation of a certified ignition interlock device prior to the issuance by the office of an ignition interlock restricted license under a provision of § 5-65-104;

(5) Require proof of the installation of the ignition interlock device and periodic reporting by the person for verification of the proper operation of the ignition interlock device;

(6) Require the person to have the ignition interlock device serviced and monitored at least every sixty-seven (67) days for proper use and accuracy by an entity approved by the Department of Health; and

(7)(A) Require the person to pay the reasonable cost of leasing or buying and monitoring and maintaining the ignition interlock device.

(B) The office may establish a payment schedule for the reasonable cost of leasing or buying and monitoring and maintaining the ignition interlock device.

(c)(1) A person restricted under this section to operate only a motor vehicle that is equipped with an ignition interlock device may not solicit or have another person start or attempt to start a motor vehicle equipped with an ignition interlock device.

(2) Except as provided in subsection (g) of this section, a violation of this subsection is a Class A misdemeanor.

(d)(1) A person may not start or attempt to start a motor vehicle equipped with an ignition interlock device for the purpose of providing an operable motor vehicle to a person who is restricted under this section to operate only a motor vehicle that is equipped with an ignition interlock device.

(2) Except as provided in subsection (g) of this section, a violation of this subsection is a Class A misdemeanor.

(e)(1) A person may not tamper with or in any way attempt to circumvent the operation of an ignition interlock device that has been installed in a motor vehicle.

(2) Except as provided in subsection (g) of this section, a violation of this subsection is a Class A misdemeanor.

(f)(1) A person may not knowingly provide a motor vehicle not equipped with a functioning ignition interlock device to another person

who the provider of the vehicle knows or should know was restricted to operate only a motor vehicle equipped with an ignition interlock device.

(2) Except as provided in subsection (g) of this section, a violation of this subsection is a Class A misdemeanor.

(g)(1) Any person found to have violated subsections (c)-(f) of this section is guilty of a Class A misdemeanor.

(2) However, the penalty provided in subdivision (g)(1) of this section does not apply if:

(A) The starting of a motor vehicle or the request to start a motor vehicle equipped with an ignition interlock device is done for the purpose of safety or mechanical repair of the ignition interlock device or the motor vehicle and the person subject to the restriction does not operate the motor vehicle; or

(B)(i) The court finds that a person is required to operate a motor vehicle in the course and scope of the person's employment and, if the motor vehicle is owned by the employer, that the person may operate that motor vehicle during regular working hours for the purposes of his or her employment without installation of an ignition interlock device if the employer has been notified of the driving privilege restriction and if proof of that notification is with the motor vehicle.

(ii) However, the employment exemption in subdivision (g)(2)(B)(i) does not apply if the business entity that owns the motor vehicle is owned or controlled by the person who is prohibited from operating a motor vehicle not equipped with an ignition interlock device.

(h) If the person restricted under this section cannot provide proof of installation of a functioning ignition interlock device to the office under subsection (a) of this section, the office shall not issue an ignition interlock restricted license as authorized under this section.

(i) In addition to any other penalty authorized under this section, if the office finds that a person has violated a condition under this section related to the proper use, circumvention, or maintenance of an ignition interlock device, the office shall revoke the ignition interlock restricted license and reinstate a license suspension for the term of the original license suspension.

(j) Any person whose license was suspended under § 5-65-104 who would otherwise be eligible to obtain an ignition interlock restricted license may petition the office for a hearing and the office or its designated official may issue an ignition interlock restricted license as authorized under the applicable provisions of §§ 5-65-104 and 5-65-205.

(k)(1) The department shall:

(A) Certify the ignition interlock devices for use in this state,

(B) Approve the entities that install and monitor the ignition interlock devices; and

(C) Adopt rules and regulations for the certification of the ignition interlock devices and ignition interlock device installation.

(2) The rules and regulations shall require an ignition interlock device, at a minimum, to:

(A) Not impede the safe operation of the motor vehicle;

(B) Minimize the opportunities to be bypassed;

(C) Work accurately and reliably in an unsupervised environment;

(D) Properly and accurately measure the person's blood alcohol levels;

(E) Minimize the inconvenience to a sober user; and

(F) Be manufactured by an entity that is responsible for installation, user training, and servicing and maintenance of the ignition interlock device, and that is capable of providing monitoring reports to the office.

(3) The division shall develop a warning label to be affixed to any ignition interlock device used in the state to warn any person of the possible penalties for tampering with or attempting to circumvent the ignition interlock device.

(4) The division shall:

(A) Publish and update a list of certified ignition interlock device manufacturers and approved ignition interlock device installers; and

(B) Periodically provide the list required by subdivision (k)(4)(A) of this section to the office.

History. Acts 1993, No. 298, § 1; 1995, No. 1296, § 8; 1999, No. 1468, § 2; 2001, No. 1206, § 2; 2001, No. 1501, § 2; 2005, No. 1234, § 2; 2007, No. 827, § 79.

RESEARCH REFERENCES

ALR. Validity, construction, and application of ignition interlock laws. 15 A.L.R.6th 375.

5-65-119. Distribution of fee.

(a) The Office of Driver Services shall charge a fee to be calculated as provided under subsection (b) of this section for reinstating a driving privilege suspended or revoked because of an arrest for operating or being in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood, § 5-65-103, or refusing to submit to a chemical test of blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance contents of the person's blood or breath, § 5-65-205, and the fee shall be distributed as follows:

(1) Seven percent (7%) of the revenues derived from this fee shall be deposited into the State Treasury as special revenues and credited to the Public Health Fund to be used exclusively for the Office of Alcohol Testing of the Department of Health;

(2) Thirty-three percent (33%) of the revenues derived from this fee shall be deposited as special revenues into the State Treasury into the Constitutional Officers Fund and the State Central Services Fund as a direct revenue to be used by the Office of Driver Services for use in

supporting the administrative driver's licensing revocation and sanctions programs provided for in this subchapter;

(3) Ten percent (10%) of the revenues derived from this fee shall be deposited into the State Treasury, and the Treasurer of State shall credit them as general revenues to the various funds in the respective amounts to each and to be used for the purposes as provided in the Revenue Stabilization Law, § 19-5-101 et seq.; and

(4) Fifty percent (50%) of the revenues derived from this fee shall be deposited into the State Treasury as special revenues to the credit of the Department of Arkansas State Police Fund.

(b)(1)(A) The reinstatement fee shall be calculated by multiplying one hundred fifty dollars ($150) by each separate occurrence of an offense resulting in an administrative suspension order under § 5-65-103 or § 5-65-205 unless the administrative suspension order has been removed because:

(i) The person has been found not guilty of the offense by a circuit court or district court; or

(ii) A de novo review of the administrative suspension order by the Office of Driver Services results in the removal.

(B) The fee under this section is supplemental to and in addition to any fee imposed under § 5-65-304, § 5-65-310, § 27-16-508, or § 27-16-808.

(2) As used in this subsection, "occurrence" means each separate calendar date when an offense or offenses take place.

History. Acts 1995, No. 802, § 2; 2001, No. 561, § 6; 2003, No. 1001, § 1; 2005, No. 1992, § 1; 2013, No. 361, § 3.

Amendments. The 2013 amendment, in (a), inserted "saliva" following "blood, breath" and "concentration" preceding "or controlled substance."

5-65-120. Restricted driving permit.

(a) Following an administrative hearing for suspension or revocation of a driver's license as provided for in § 5-65-402, or upon a request of a person whose privilege to drive has been denied or suspended, the Office of Driver Services or its designated agent may modify the denial or suspension in a case of extreme and unusual hardship by the issuance of a restricted driving permit when, upon a review of the person's driving record for a time period of five (5) years prior to the current denial, revocation, or suspension of driving privilege or a driver's license, at the discretion of the office or its designated agent it is determined that:

(1) The person:

(A) Is not a multiple traffic law offender; or

(B) Does not present a threat to the general public; and

(2) No other adequate means of transportation exists for the person except to allow driving in any of the following situations:

(A) To and from the person's place of employment;

(B) In the course of the person's employment;

(C) To and from an educational institution for the purpose of attending a class if the person is enrolled and regularly attending a class at the institution;

(D) To and from an alcohol education program or alcoholism treatment program for drunk drivers; or

(E) To and from a hospital or clinic for medical treatment or care for an illness, disease, or other medical condition of the person or a family member.

(b) The restricted driving permit shall state the specific times and circumstances under which driving is permitted.

(c) The restricted driving permit shall not be granted to any person suspended for a second or subsequent offense of violating § 5-65-103, § 5-65-205, § 5-65-303, or § 5-65-310.

History. Acts 1995, No. 802, §§ 3, 5; 1997, No. 1325, § 3; 1999, No. 1077, § 14; 2007, No. 827, § 80; 2009, No. 748, § 29; 2009, No. 1293, § 2.

Amendments. The 2009 amendment by No. 748 substituted "an alcohol education program or alcoholism treatment program" for "the alcohol education and alcoholism treatment programs for drunk drivers" in (a)(2)(D).

The 2009 amendment by No. 1293, in the introductory language of (a), substituted "current denial, revocation, or suspension" for "current suspension" and inserted "or a driver's license" near the end; and deleted (d).

5-65-121. Victim impact panel attendance — Fee.

(a)(1) A person whose driving privileges are suspended or revoked for violating § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, or § 3-3-203 shall attend a victim impact panel sponsored by an organization approved by the Division of Behavioral Health Services of the Department of Human Services.

(2) The organization selected by the office shall be an organization that provides statewide services to victims of drunk driving.

(b)(1) The organization approved by the office may collect a program fee of ten dollars ($10.00) per enrollee to offset program costs to be remitted to the organization.

(2) The organization approved by the office shall provide proof of attendance and completion to the person required to attend the victim impact panel upon completion of the victim impact panel.

History. Acts 2009, No. 946, § 1; 2013, No. 1107, § 6.

Amendments. The 2013 amendment substituted "Division of Behavioral Health Services" for "Office of Alcohol and Drug Abuse Prevention" in (a)(1).

5-65-122. Driving while intoxicated — Sixth or subsequent offense.

(a)(1) A sixth or subsequent offense of violating § 5-65-103 occurring within ten (10) years of a prior offense is a Class B felony.

(2)(A) A person may be sentenced under this section to two (2) years' community service in lieu of imprisonment or fine unless a person under sixteen (16) years of age was in the vehicle at the time of the

offense, for which the person may be sentenced under this section to three (3) years' community service in lieu of imprisonment or fine.

(B) If the court orders community service under subdivision (a)(2)(A) of this section, it shall clearly set forth in written findings the reasons for the order of community service.

(b) The following are considered a prior offense for purposes of subsection (a) of this section:

(1) A prior conviction for violation of a penal law of another state, federal, or foreign jurisdiction that is equivalent to § 5-65-103; or

(2) A prior conviction for violation of § 5-10-105(a)(1)(A) or (B).

History. Acts 2013, No. 1268, § 3.

Subchapter 2 — Chemical Analysis of Body Substances

5-65-202. Implied consent.

(a) Any person who operates a motor vehicle or is in actual physical control of a motor vehicle in this state is deemed to have given consent, subject to the provisions of § 5-65-203, to one (1) or more chemical tests of his or her blood, breath, saliva, or urine for the purpose of determining the alcohol or controlled substance content of his or her breath or blood if:

(1) The person is arrested for any offense arising out of an act alleged to have been committed while the person was driving while intoxicated or driving while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood;

(2) The person is involved in an accident while operating or in actual physical control of a motor vehicle; or

(3) At the time the person is arrested for driving while intoxicated, the law enforcement officer has reasonable cause to believe that the person, while operating or in actual physical control of a motor vehicle, is intoxicated or has an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided by subsection (a) of this section, and one (1) or more chemical tests may be administered subject to the provisions of § 5-65-203.

History. Acts 1969, No. 106, § 1; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; A.S.A. 1947, § 75-1045; Acts 1987, No. 75, § 1; 1993, No. 132, § 1; 2001, No. 561, § 7; 2009, No. 431, § 1; 2013, No. 361, § 4.

Amendments. The 2009 amendment substituted "one (1) or more chemical tests" for "a chemical test" in (a) and (b).

The 2013 amendment inserted "saliva" following "blood, breath" in (a).

5-65-203. Administration.

(a) One (1) or more chemical tests authorized in § 5-65-202 shall be administered at the direction of a law enforcement officer having reasonable cause to believe the person to have been operating or in actual physical control of a motor vehicle while intoxicated or while there was an alcohol concentration of eight hundredths (0.08) or more in the person's breath or blood.

(b)(1) The law enforcement agency by which the law enforcement officer is employed shall designate which chemical test or chemical tests shall be administered, and the law enforcement agency is responsible for paying any expense incurred in conducting the chemical test or chemical tests.

(2) If the person tested requests that additional chemical test or chemical tests be made, as authorized in § 5-65-204(e), the cost of the additional chemical test or chemical tests shall be borne by the person tested, unless the person is found not guilty in which case the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test or chemical tests.

(3) If any person objects to the taking of his or her blood for a chemical test, as authorized in this chapter, the breath, saliva, or urine of the person may be used for the chemical test.

History. Acts 1969, No. 106, § 1; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; A.S.A. 1947, § 75-1045; Acts 1987, No. 75, § 1; 2001, No. 561, § 8; 2009, No. 431, § 2; 2013, No. 361, § 5.

Amendments. The 2009 amendment substituted "One (1) or more chemical tests authorized in § 5-65-202" for "A chemical test" in (a); inserted "or chemical tests" in five places throughout (b); and made a minor stylistic change.

The 2013 amendment, in (b)(3), inserted "saliva," and substituted "for the chemical test" for "to make the chemical analysis."

5-65-204. Validity — Approved methods.

(a)(1) As used in this chapter, § 5-10-105, § 5-75-101 et seq., and § 5-76-101 et seq., "alcohol concentration" means either:

(A) Grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood; or

(B) Grams of alcohol per two hundred ten liters (210 l) of breath.

(2) The alcohol concentration of urine, saliva, or other bodily substance is based upon grams of alcohol per one hundred milliliters (100 ml) or one hundred cubic centimeters (100 cc) of blood, the same being percent weight per volume or percent alcohol concentration.

(b)(1)(A) A chemical test made to determine the presence and amount of alcohol in a person's blood, urine, saliva, or breath to be considered valid under this chapter shall be performed according to a method approved by the Department of Health and State Board of

Health or by an individual possessing a valid certificate issued by the department for this purpose.

(B) The department may:

(i) Approve satisfactory techniques or methods for the chemical test;

(ii) Ascertain the qualifications and competence of an individual to conduct the chemical test; and

(iii) Issue a certificate that is subject to termination or revocation at the discretion of the department.

(C)(i) An auxiliary law enforcement officer appointed as a reserve law enforcement officer and certified by the department in the operation of an instrument used to determine the alcohol content of the breath may operate an instrument used to determine the alcohol content of the breath under this chapter.

(ii) The department shall promulgate rules to implement subdivision (b)(1)(C)(i) of this section.

(2) However, a method of chemical analysis of a person's blood, urine, saliva, or other bodily substance made by the State Crime Laboratory for determining the presence of one (1) or more controlled substances or any intoxicant is exempt from approval by the department or the State Board of Health.

(c)(1) When a person submits to a blood test at the request of a law enforcement officer under a provision of this section, blood may be drawn by a physician or a person acting under the direction and supervision of a physician.

(2) The limitation in subdivision (c)(1) of this section does not apply to the taking of a breath, saliva, or urine specimen.

(3)(A) No person, institution, or office in this state that withdraws blood for the purpose of determining alcohol or controlled substance content of the blood at the request of a law enforcement officer under a provision of this chapter shall be held liable for violating any criminal law of this state in connection with the withdrawing of the blood.

(B) No physician, institution, or person acting under the direction or supervision of a physician shall be held liable in tort for the withdrawal of the blood unless the person is negligent in connection with the withdrawal of the blood or the blood is taken over the objections of the subject.

(d)(1) The person tested may have a physician or a qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.

(2) The law enforcement officer shall advise the person in writing of the right provided in subdivision (e)(1) of this section and that if the person chooses to have an additional chemical test and the person is found not guilty, the arresting law enforcement agency shall reimburse the person for the cost of the additional chemical test.

(3) The refusal or failure of a law enforcement officer to advise a person of the right provided in subdivision (e)(1) of this section and to

permit and assist the person to obtain a chemical test under subdivision (e)(1) of this section precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.

(e) Upon the request of the person who submits to a chemical test at the request of a law enforcement officer, full information concerning the chemical test shall be made available to the person or to his or her attorney.

History. Acts 1969, No. 106, §§ 1, 2; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; 1985, No. 169, § 1; A.S.A. 1947, §§ 75-1045, 75-1046; Acts 1989, No. 361, § 1; 2001, No. 561, §§ 9, 10; 2005, No. 886, § 1; 2011, No. 1240, § 1; 2013, No. 361, § 6.

Amendments. The 2011 amendment, in (b)(1)(A), substituted "analysis" for "analyses," "this chapter" for "the provisions of this act," and "Department of Health" for "Division of Health of the Department of Health and Human Services"; substituted "certificate" for "permit" in (b)(1)(A) and (b)(1)(B)(iii); substituted "department" for "division" in (b)(1)(A), the introductory language of (b)(1)(B), and (b)(1)(B)(iii); and inserted (b)(1)(C).

The 2013 amendment rewrote the introductory language of (a)(1); substituted "urine, saliva, or other bodily substance" for "other bodily substances" in (a)(2); substituted "chemical test" for "chemical analysis" in (b)(1)(A) and (b)(1)(B); inserted "saliva" and "and State Board of Health" in (b)(1)(A); in (b)(2), inserted "saliva" and substituted "department" for "division"; deleted former (c); and redesignated (d) as (c); and, in (c)(2), substituted "subdivision (c)(1)" for "subdivision (d)(1)" and inserted "saliva."

CASE NOTES

Analysis

Additional Tests.
Compliance.
Jury Instructions.

Additional Tests.

Where defendant was arrested for driving while intoxicated, although the notice given to defendant by the officers regarding her right to have a different sobriety test was incomplete, defendant was notified that she could request a different type of test but failed to do so; thus, defendant was not permitted to exclude the results of her breathalyzer test. Reynolds v. State, 96 Ark. App. 360, 241 S.W.3d 765 (2006).

Compliance.

Because the breathalyzer test was not illegally obtained, Ark. R. Crim. P. 16.2 did not apply, and as no argument was made that a conflict existed between the rules and § 5-65-204, defendant's motion to prohibit the introduction of the breathalyzer test into evidence was not a motion to suppress and the trial court erred in admitting the breathalyzer results over the objection of defendant where the form used to advise defendant failed to meet the statutory requirements, because the rights form had been found defective. Mhoon v. State, 369 Ark. 134, 251 S.W.3d 244 (2007).

Circuit court erred in allowing the results of defendant's blood-alcohol test into evidence because the state failed to provide evidence that the blood was drawn by a physician or a person acting under the direction and supervision of a physician as required by this section; there was no evidence that the medical center employee who drew defendant's blood was a registered nurse, otherwise qualified to withdraw blood, or performing his normal duties of withdrawing blood from a patient, and there was no evidence that the employee was acting under the supervision or direction of a physician at the time defendant's blood was drawn. Bates v. State, 2011 Ark. App. 446, 384 S.W.3d 654 (2011).

Jury Instructions.

Trial court did not err in rejecting a DUI defendant's proffered jury instructions because the instructions' omission of any reference to chemical testing or chemical

analysis failed to take into account § 5-65-103' s incorporation of this section, which describes "the chemical analysis of a person's blood, urine, or breath." The model jury instruction represented a more accurate reflection of the law, although it did not address the 2001 amendment to § 5-65-103, which had eliminated the phrase "as determined by a chemical test." Graham v. State, 2012 Ark. App. 90, 389 S.W.3d 33 (2012).

Cited: Taylor v. State, 2011 Ark. App. 215, — S.W.3d — (2011).

5-65-205. Refusal to submit.

(a)(1) If a person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency, as provided in § 5-65-202, no chemical test shall be given, and the person's motor vehicle operator's license shall be seized by the law enforcement officer, and the law enforcement officer shall immediately deliver to the person from whom the motor vehicle operator's license was seized a temporary driving permit, as provided by § 5-65-402.

(2) Refusal to submit to a chemical test under this subsection is a strict liability offense and is a violation pursuant to § 5-1-108.

(b) The Office of Driver Services shall then proceed to suspend or revoke the driving privilege of the arrested person, as provided in § 5-65-402. The suspension shall be as follows:

(1)(A)(i) Suspension for one hundred eighty (180) days for the first offense of refusing to submit to a chemical test of blood, breath, saliva, or urine for the purpose of determining the alcohol or controlled substance content of the person's blood or breath.

(ii)*(a)* However, if the office allows the issuance of an ignition interlock restricted license under § 5-65-118, the ignition interlock restricted license shall be available immediately.

(b) The ignition interlock restricted license provision of § 5-65-118 does not apply to the suspension under subdivision (b)(1)(A)(i) of this section if the person is arrested for an offense of operating or being in actual physical control of a motor vehicle while intoxicated by the ingestion of or by the use of a controlled substance.

(iii) The restricted driving permit provision of § 5-65-120 does not apply to this suspension.

(B) The office, in addition to any other penalty, shall deny to that person the issuance of an operator's license until that person has been issued an ignition interlock restricted license for a period of six (6) months;

(2) Suspension for two (2) years, during which no restricted permit may be issued, for a second offense of refusing to submit to a chemical test of blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of the person's blood or breath within five (5) years of the first offense;

(3) Revocation for three (3) years, during which no restricted permit may be issued, for the third offense of refusing to submit to a chemical test of blood, breath, saliva, or urine for the purpose of determining the

alcohol concentration or controlled substance content of the person's blood or breath within five (5) years of the first offense; and

(4) Lifetime revocation, during which no restricted permit may be issued, for the fourth or subsequent offense of refusing to submit to a chemical test of blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of the person's blood or breath within five (5) years of the first offense.

(c) [Repealed.]

(d) In order to determine the number of previous offenses to consider when suspending or revoking the arrested person's driving privileges, the office shall consider as a previous offense any of the following that occurred within the five (5) years immediately before the current offense:

(1) Any conviction for an offense of refusing to submit to a chemical test; and

(2) Any suspension or revocation of driving privileges for an arrest for refusing to submit to a chemical test when the person was not subsequently acquitted of the criminal charge.

(e) In addition to any other penalty provided for in this section:

(1) If the person is a resident without a license or permit to operate a motor vehicle in this state, the office shall deny to that person the issuance of a license or permit for a period of six (6) months for a first offense; and

(2) For a second or subsequent offense by a resident without a license or permit to operate a motor vehicle, the office shall deny to that person the issuance of a license or permit for a period of one (1) year.

History. Acts 1969, No. 106, § 1; 1971, No. 55, § 1; 1971, No. 306, § 1; 1973, No. 127, § 1; 1975, No. 660, § 1; 1983, No. 549, § 11; A.S.A. 1947, § 75-1045; Acts 1987, No. 277, § 1; 1995, No. 802, §§ 4, 5; 1999, No. 1077, § 15; 2001, No. 1501, § 3; 2003, No. 1779, § 2; 2005, No. 1234, § 1; 2007, No. 712, § 2; 2009, No. 359, § 4; 2009, No. 633, § 4, 2009, No. 748, § 30; 2013, No. 361, §§ 7, 8.

Amendments. The 2009 amendment by No. 359 added (b)(1)(A)(ii)(b).

The 2009 amendment by No. 633, in (a), inserted (a)(2) and redesignated the remaining text accordingly.

The 2009 amendment by No. 748 deleted (c).

The 2013 amendment inserted "saliva" in (b)(1)(A)(i) and (b)(2) through (b)(4); inserted "concentration" in (b)(2) through (b)(4); substituted "purpose" for "purposes" in (b)(2); and inserted "or breath" in (b)(3).

CASE NOTES

Analysis

No Citation.
Prior Convictions.

No Citation.

Court rejected defendant's claim of error in the denial of defendant's motion for a directed verdict in her driving while intoxicated (DWI) case, and contrary to defendant's claim, proof of blood-alcohol content, although admissible as evidence tending to prove intoxication, was not necessary to sustain a DWI conviction, as under § 5-65-206(a)(2), a blood alcohol level of more than .04 but less than .08 did not give rise to a presumption of intoxication, but could be considered with other evidence in determining intoxication; based on the eyewitness testimony, defen-

dant's admission to drinking, her blood-alcohol reading, the failure of her field tests, the manner in which she drove the vehicle, and the witnesses' observations regarding her inebriated condition, the jury could have reasonably concluded that she was driving while intoxicated, as defined in § 5-65-102(2), and (1) the jury could have discounted testimony by defendant's son that he was driving the car, and (2) the fact that defendant was not cited for refusal to submit was of no moment because she did not refuse to submit to testing but instead deliberately delayed an officer in obtaining a successful test result by interfering with the testing. Blair v. State, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

Prior Convictions.

During the penalty phase of defendant's trial for driving while intoxicated in violation of § 5-65-103 and refusal to submit to a chemical test in violation of this section, the trial court did not err by admitting evidence of his prior convictions for refusal to submit to a chemical test; the evidence was relevant to his sentencing as either character evidence or aggravating circumstances. Williams v. State, 2009 Ark. App. 554, — S.W.3d — (2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 732 (Oct. 29, 2009).

5-65-206. Evidence in prosecution.

(a) In any criminal prosecution of a person charged with the offense of driving while intoxicated, the amount of alcohol in the defendant's breath or blood at the time or within four (4) hours of the alleged offense, as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance gives rise to the following:

(1) If there was at that time an alcohol concentration of four hundredths (0.04) or less in the defendant's blood, urine, breath, or other bodily substance, it is presumed that the defendant was not under the influence of intoxicating liquor; and

(2) If there was at the time an alcohol concentration in excess of four hundredths (0.04) but less than eight hundredths (0.08) by weight of alcohol in the defendant's blood, urine, breath, or other bodily substance, this fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(b) The provisions in subsection (a) of this section shall not be construed as limiting the introduction of any other relevant evidence bearing upon the question of whether or not the defendant was intoxicated.

(c) The chemical analysis referred to in this section shall be made by a method approved by the State Board of Health.

(d)(1)(A) Except as provided in subsection (e) of this section, a record or report of a certification, rule, evidence analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Department of Health under the authority of this chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure when duly attested to by the Director of the Office of Alcohol Testing of the Department of Health or his or her assistant, in the form of an original signature or by certification of a copy.

(B) A document described in subdivision (d)(1)(A) of this section is self-authenticating.

(2) However, the instrument performing the chemical analysis shall have been duly certified at least one (1) time in the last three (3) months preceding arrest, and the operator of the instrument shall have been properly trained and certified.

(3) Nothing in this section is deemed to abrogate a defendant's right to confront the person who performs the calibration test or check on the instrument, the operator of the instrument, or a representative of the office.

(4) The testimony of the appropriate analyst or official may be compelled by the issuance of a proper subpoena by the party who wishes to call the appropriate analyst or official given ten (10) days prior to the date of hearing or trial, in which case the record or report is admissible through the analyst or official, who is subject to cross-examination by the defendant or his or her counsel.

(e) When a chemical analysis of a defendant's blood, urine, or other bodily substance is made by the State Crime Laboratory for the purpose of ascertaining the presence of one (1) or more controlled substances or any intoxicant, other than alcohol, in any criminal prosecution under § 5-65-103, § 5-65-303, or § 5-10-105, the provisions of § 12-12-313 govern the admissibility of the chemical analysis into evidence rather than the provisions of this section.

History. Acts 1957, No. 346, § 1; 1961, No. 215, § 1; 1969, No. 17, § 1; 1971, No. 578, § 1; 1983, No. 549, § 12; A.S.A. 1947, § 75-1031.1; Acts 1989, No. 928, § 1; 1999, No. 462, § 1; 2001, No. 561, §§ 11, 12; 2005, No. 886, § 2; 2007, No. 650, § 1; 2009, No. 748, § 31.

Amendments. The 2009 amendment substituted "A document described in subdivision (d)(1)(A) of this section is" for "These documents are" in (d)(1)(B).

CASE NOTES

Analysis

Certificate.
Cross-Examination of Operator.
Evidence.

Certificate.

At defendant's trial for driving while intoxicated, the trial court did not err in admitting certificates under subdivision (d)(1)(A) of this section showing an officer was certified to administer BAC test and that the machine used to administer the test had been calibrated because the documents were not testimonial in nature and did not trigger the application of the Sixth Amendment Confrontation Clause. Chambers v. State, 2012 Ark. App. 383, — S.W.3d — (2012).

Cross-Examination of Operator.

It was not a violation of subdivision (d)(1) of this section to admit certificates of the calibration of a breathalyzer machine and of the qualifications of the machine's operator, without the testimony of the authors of those certificates, because the statute had been amended to remove a prior requirement that the State provide such witnesses upon receiving notice from a defendant. Chambers v. State, 2012 Ark. 407, — S.W.3d —, 2012 Ark. LEXIS 425 (Nov. 1, 2012).

In defendant's trial for driving while intoxicated, it was not improper to place the burden on defendant, under subdivision (d)(4) of this section, to subpoena the authors of certificates that the breathalyzer machine used in defendant's case

had been properly calibrated and that the operator of the machine was qualified, if defendant wished to cross-examine the authors, because the certificates were not testimonial evidence, so the State had no duty to bring the authors into court. Chambers v. State, 2012 Ark. 407, — S.W.3d —, 2012 Ark. LEXIS 425 (Nov. 1, 2012).

Evidence.

Where a breath test performed within two hours of a traffic stop in accordance with subdivision (a)(2) of this section showed that defendant's blood alcohol level was more than 0.08, defendant's claim that his alcohol level would have still been rising at the time of the offense and could have been peaking at the time of the tests was unsupported by the evidence. The test results, along with evidence that he smelled of alcohol, crossed the center line, and failed sobriety tests was sufficient to support his conviction of driving while intoxicated pursuant to § 5-65-103(a). Hayden v. State, 103 Ark. App. 32, 286 S.W.3d 177 (2008).

Court rejected defendant's claim of error in the denial of defendant's motion for a directed verdict in her driving while intoxicated (DWI) case, and contrary to defendant's claim, proof of blood-alcohol content, although admissible as evidence tending to prove intoxication, was not necessary to sustain a DWI conviction, as under subdivision (a)(2) of this section, a blood alcohol level of more than .04 but less than .08 did not give rise to a presumption of intoxication, but could be considered with other evidence in determining intoxication; based on the eyewitness testimony, defendant's admission to drinking, her blood-alcohol reading, the failure of her field tests, the manner in which she drove the vehicle, and the witnesses' observations regarding her inebriated condition, the jury could have reasonably concluded that she was driving while intoxicated, as defined in § 5-65-102(2), and (1) the jury could have discounted testimony by defendant's son that he was driving the car, and (2) the fact that defendant was not cited for refusal to submit was of no moment because she did not refuse to submit to testing but instead deliberately delayed an officer in obtaining a successful test result by interfering with the testing. Blair v. State, 103 Ark. App. 322, 288 S.W.3d 713 (2008).

5-65-207. Alcohol testing devices.

(a)(1) Any instrument used to determine the alcohol content of the breath for the purpose of determining if the person was operating a motor vehicle while intoxicated or with an alcohol concentration of eight hundredths (0.08) or more shall be so constructed that the analysis is made automatically when a sample of the person's breath is placed in the instrument, and without any adjustment or other action of the person administering the analysis.

(2) The instrument shall be so constructed that the alcohol content is shown by visible digital display on the instrument and on an automatic readout.

(b) Any breath analysis made by or through the use of an instrument that does not conform to the requirements prescribed in this section is inadmissible in any criminal or civil proceeding.

(c)(1) The State Board of Health may adopt appropriate rules and regulations to carry out the intent and purposes of this section, and only instruments approved by the board as meeting the requirements of this section and regulations of the board shall be used for making the breath analysis for determining alcohol concentration.

(2)(A) The Department of Health specifically may limit by its rules the types or models of testing devices that may be approved for use in Arkansas for the purposes set forth in this section.

(B) The approved types or models shall be specified by manufacturer's name and model.

(d) Any law enforcement agency that conducts alcohol testing shall maintain full compliance with this section.

History. Acts 1985, No. 533, §§ 1-3; A.S.A. 1947, §§ 75-1046.1 — 75-1046.3; Acts 1989, No. 419, § 1; 2001, No. 561, § 13; 2007, No. 827, § 81.

CASE NOTES

Cited: City of Little Rock v. Hudson, 366 Ark. 415, 236 S.W.3d 509 (2006).

5-65-208. Motor vehicle accidents — Testing required.

(a) When the driver of a motor vehicle is involved in an accident resulting in loss of human life or when there is reason to believe death may result, in addition to a penalty established elsewhere under state law, a chemical test of the driver's blood, breath, saliva, or urine shall be administered to the driver, even if fatally injured, to determine the presence of and percentage of alcohol concentration or the presence of a controlled substance, or both, in the driver's body.

(b)(1) The law enforcement agency that investigates an accident described in subsection (a) of this section, the physician in attendance, or any other person designated by state law shall order the chemical test as soon as practicable.

(2)(A) The person who conducts the chemical test under subsection (a) of this section of the driver's blood, breath, saliva, or urine shall forward the results of the chemical test to the Department of Arkansas State Police, and the department shall establish and maintain the results of the chemical tests required by subsection (a) of this section in a database.

(B) The information in the database shall reflect the number of fatal motor vehicle accidents in which:

(i) Alcohol was found to be a factor, with the percentage of alcohol concentration involved;

(ii) Controlled substances were found to be a factor, listing the class of controlled substances so found and their amounts; and

(iii) Both alcohol and controlled substances were found to be factors, with the percentage of alcohol concentration involved, and listing the class of controlled substances so found and their amounts.

(c) The results of the chemical tests required by this section shall be reported to the department and may be used by state and local officials for statistical purposes that do not reveal the identity of the deceased person or for any law enforcement purpose, including prosecution for the violation of any law.

History. Acts 1995, No. 711, § 2; 1995, No. 1105, § 2; 2003, No. 950, § 1; 2009, No. 423, § 1; 2011, No. 1120, § 13; 2013, No. 361, § 9.

Amendments. The 2009 amendment, in (a), redesignated the text and deleted "and there exists probable cause to believe that the driver is guilty of a violation of the state's law prohibiting driving while under the influence" following "death may result"; in (b)(1), substituted "law enforcement agency that investigates" for "police officer who responds to" and deleted "who was present when the death occurred" following "state law"; added "or for any law enforcement purpose, including prosecution for the violation of any law" in (c); and made related and minor stylistic changes.

The 2011 amendment substituted "an accident described in subsection (a) of this section" for "the collision" in (b)(1).

The 2013 amendment deleted designation (a)(1); substituted "controlled substances" for "drugs" in (a), twice in (b)(2)(B)(ii), and twice in (b)(2)(B)(iii); in (a), substituted "saliva" for "blood, breath" and "alcohol concentration" for "concentration of alcohol"; substituted "chemical tests" for "analyses" in (b)(2)(A) and (c); and, in (b)(2)(A), substituted "person who conducts" for "medical personnel who conducted" and inserted "saliva."

Subchapter 3 — Underage Driving Under the Influence Law

5-65-303. Conduct proscribed.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State "Zero Tolerance" Laws Relating to Underage Drinking and Driving. 34 A.L.R.6th 623.

CASE NOTES

Search and Seizure.

When defendant was arrested for suspicion of underage driving under the influence in violation of subsection (b) of this section, the deputy's actions in transporting defendant to a nearby county outside his jurisdiction to administer a breathalyzer test were lawful under the Fourth Amendment because the test had to be given without delay due to the exigent circumstance of defendant's falling blood alcohol content and in accordance with Health Department regulations. Pickering v. State, 2012 Ark. 280, — S.W.3d — (2012).

5-65-304. Seizure, suspension, and revocation of license — Temporary permits.

(a) At the time of arrest for violating § 5-65-303, the arresting law enforcement officer shall seize the motor vehicle operator's license of the underage person arrested and issue to the underage person a temporary driving permit as provided by § 5-65-402.

(b)(1) The Office of Driver Services shall suspend or revoke the driving privileges of the arrested underage person under the provisions of § 5-65-402 and the arrested underage person shall have the same right to hearing and judicial review as provided under § 5-65-402.

(2) The suspension or revocation shall be as follows:

(A) Suspension for ninety (90) days for the first offense of violating § 5-65-303;

(B) Suspension for one (1) year for the second offense of violating § 5-65-303; and

(C)(i) Revocation for the third or subsequent offense of violating § 5-65-303 occurring while the person is underage.

(ii) Revocation is until the underage person reaches twenty-one (21) years of age or for a period of three (3) years, whichever is longer.

(c) In order to determine the number of previous offenses to consider when suspending or revoking the arrested underage person's driving privileges, the office shall consider as a previous offense:

(1) Any conviction for violating § 5-65-103 or § 5-65-303; and

(2) Any suspension or revocation of driving privileges for an arrest for a violation of § 5-65-103 or § 5-65-303 when the person was not subsequently acquitted of the criminal charge.

(d)(1)(A)(i) The office shall charge a fee to be calculated as provided under subdivision (d)(2)(B) of this section for reinstating a driver's license suspended because of a violation of § 5-65-303 or § 5-65-310.

(ii) Forty percent (40%) of the revenues derived from this fee shall be deposited into the State Treasury as special revenues and credited to the Public Health Fund to be used exclusively for the Blood Alcohol Program of the Department of Health.

(B) The reinstatement fee is calculated by multiplying twenty-five dollars ($25.00) by each separate occurrence of an offenses resulting in an administrative suspension order under § 5-65-303 unless the administrative suspension order has been removed because:

(i) The person has been found not guilty of the offense by a circuit court or district court; or

(ii) A de novo review of the administrative suspension order by the office results in the removal.

(C) The fee under this section is supplemental to and in addition to any fee imposed under § 5-65-119, § 5-65-310, § 27-16-508, or § 27-16-808.

(2) As used in this subsection, "occurrence" means each separate calendar date when an offense or offenses take place.

History. Acts 1993, No. 863, § 4; 1999, No. 1077, § 16; 2005, No. 1992, § 2; 2007, No. 712, § 3.

5-65-307. Alcohol and driving education program.

(a)(1)(A) Any person who has his or her driving privileges suspended, revoked, or denied for violating § 3-3-203, § 5-65-310, or § 5-65-303 is required to complete an alcohol and driving education program for underage drivers as prescribed and approved by the Division of Behavioral Health Services or an alcoholism treatment program licensed by the Division of Behavioral Health Services, or both, in addition to any other penalty provided in this chapter.

(B) If during the period of suspension or revocation in subdivision (a)(1)(A) of this section the underage person commits an additional violation of § 3-3-203 or § 5-65-303, the underage person is also required to complete an approved alcohol and driving education program or alcoholism treatment program for each additional violation.

(2) The Division of Behavioral Health Services shall approve only those programs in alcohol and driving education that are targeted at the underage driving group and are intended to intervene and prevent repeat occurrences of driving under the influence or driving while intoxicated.

(3)(A)(i) The alcohol and driving education program may collect a program fee of up to one hundred twenty-five dollars ($125) per enrollee to offset program costs.

(ii) An underage person ordered to complete an alcohol and driving education program or an alcoholism treatment program under this section may be required to pay, in addition to the costs collected for the program, a fee of up to twenty-five dollars ($25.00) to offset the additional costs associated with reporting requirements under this subchapter.

(B) An approved alcohol and driving education program shall report monthly to the Division of Behavioral Health Services all revenue derived from these fees.

(b) Prior to reinstatement of a driver's license suspended or revoked under this subchapter, the driver shall furnish proof of attendance at and completion of the alcohol and driving education program or alcoholism treatment program required under subdivision (a)(1) of this section.

(c) The Division of Behavioral Health Services may promulgate rules reasonably necessary to carry out the purposes of this section regarding the approval and monitoring of the alcohol and driving education programs.

(d)(1)(A) A person whose license is suspended or revoked for violating § 5-65-303 or § 5-65-310 shall:

(i) Both:

(a) Furnish proof of attendance at and completion of the alcohol and driving education program or alcoholism treatment program required under subdivision (a)(1) of this section and at a victim impact panel as provided in § 5-65-121 before reinstatement of his or her suspended or revoked driver's license; and

(b) Pay any fee for reinstatement required under § 5-65-119, § 5-65-304, or § 5-65-121; or

(ii) Furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(B) An application for reinstatement shall be made to the Office of Driver Services.

(2) Even if a person has filed a de novo petition for review pursuant to § 5-65-402, the person is entitled to reinstatement of driving

privileges upon complying with this subsection and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

(3)(A) A person suspended under this subchapter may enroll in an alcohol education program prior to disposition of the offense by the circuit court, district court, or city court, but is not entitled to any refund of fees paid if the charges are dismissed or if the person is acquitted of the charges.

(B) A person who enrolls in an alcohol education program is not entitled to any refund of fees paid if the person is subsequently acquitted.

(e) Any alcohol and driving education program shall remit the fees imposed under this section to the Division of Behavioral Health Services.

History. Acts 1993, No. 863, § 7; 1995, No. 1256, § 20; 1995 (1st Ex. Sess.), No. 13, § 4; 1999, No. 1077, § 19; 2003, No. 1462, § 3; 2005, No. 1768, § 4; 2007, No. 251, § 3; 2009, No. 946, § 2; 2013, No. 1107, §§ 7, 8.

Amendments. The 2009 amendment, in (d)(1)(A)(i), inserted "and at a victim impact panel as provided in § 5-65-121" in (d)(1)(A)(i)(*a*), inserted "or § 5-65-121" in (d)(1)(A)(i)(*b*), and made related changes.

The 2013 amendment substituted "Division of Behavioral Health Services" for "Office of Alcohol and Drug Abuse Prevention" throughout the section.

5-65-309. Implied consent.

(a) Any underage person who operates a motor vehicle or is in actual physical control of a motor vehicle in this state is deemed to have given consent, subject to the provisions of § 5-65-203, to a chemical test of his or her blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of his or her breath or blood if:

(1) The underage person is arrested for any offense arising out of an act alleged to have been committed while the underage person was driving while under the influence or driving while there was an alcohol concentration of two-hundredths (0.02) but less than eight-hundredths (0.08) in his or her breath or blood;

(2) The underage person is involved in an accident while operating or in actual physical control of a motor vehicle; or

(3) The underage person is stopped by a law enforcement officer who has reasonable cause to believe that the underage person, while operating or in actual physical control of a motor vehicle, is under the influence or has an alcohol concentration of two-hundredths (0.02) but less than eight-hundredths (0.08) in his or her breath or blood.

(b) Any underage person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided by subsection (a) of this section, and a chemical test may be administered subject to the provisions of § 5-65-203.

History. Acts 1993, No. 863, § 9; 2001, No. 561, § 15; 2013, No. 361, § 10.

Amendments. The 2013 amendment inserted "saliva" and "concentration" in (a).

CASE NOTES

Breath Test.

When defendant was arrested for suspicion of underage driving under the influence in violation of § 5-65-303(b), the deputy's actions in transporting defendant to a nearby county outside his jurisdiction to administer a breathalyzer test were lawful under the Fourth Amendment because the test had to be given without delay due to the exigent circumstance of defendant's falling blood alcohol content and in accordance with Health Department regulations. Defendant consented to the test for purposes of subdivision (a)(1) of this section. Pickering v. State, 2012 Ark. 280, — S.W.3d — (2012).

5-65-310. Refusal to submit.

(a)(1) If an underage person under arrest refuses upon the request of a law enforcement officer to submit to a chemical test designated by the law enforcement agency, as provided in § 5-65-309, no chemical test shall be given, and the underage person's driver's license shall be seized by the law enforcement officer, and the law enforcement officer shall immediately deliver to the underage person from whom the driver's license was seized a temporary driving permit, as provided by § 5-65-402.

(2) Refusal to submit to a chemical test under this subsection is a strict liability offense and is a violation pursuant to § 5-1-108.

(b)(1) The Office of Driver Services shall suspend or revoke the driving privileges of the arrested underage person under § 5-65-402.

(2) The office shall suspend the underage person's driving privileges as follows:

(A) Suspension for ninety (90) days for a first offense under this section;

(B) Suspension for one (1) year for a second offense under this section; and

(C)(i) Revocation for the third or subsequent offense occurring while the person is underage.

(ii) Revocation is until the underage person reaches twenty-one (21) years of age or for a period of three (3) years, whichever is longer.

(c) In order to determine the number of previous offenses to consider when suspending or revoking the arrested underage person's driving privileges, the office shall consider as a previous offense:

(1) Any conviction for violating § 5-65-310; and

(2) Any suspension or revocation of driving privileges for an arrest for a violation of § 5-65-310 when the person was not subsequently acquitted of the criminal charge.

(d) In addition to any other penalty provided for in this section, if the underage person is a resident without a license or permit to operate a motor vehicle in this state:

(1) The office shall deny to that underage person the issuance of a license or permit for a period of six (6) months for a first offense; and

(2) For a second or subsequent offense by an underage resident without a license or permit to operate a motor vehicle, the office shall deny to that underage person the issuance of a license or permit for a period of one (1) year.

(e) When an underage nonresident's privilege to operate a motor vehicle in this state has been suspended, the office shall notify the office of issuance of that underage person's nonresident motor vehicle license of action taken by the office.

(f)(1)(A) The office shall charge a reinstatement fee to be calculated as provided under subdivision (f)(1)(B) of this section for reinstating a driver's license suspended or revoked for a violation of this section.

(B) The reinstatement fee is calculated by multiplying twenty-five dollars ($25.00) by the number of offenses resulting in an administrative suspension order under § 5-65-310 unless the administrative suspension order has been removed because:

(i) The person has been found not guilty of the offense by a circuit court or district court; or

(ii) The office has entered an administrative suspension order.

(C) The fee under subdivision (f)(1)(A) of this section is supplemental to and in addition to any fee imposed by § 5-65-119, § 5-65-304, § 27-16-508, or § 27-16-808.

(2) Forty percent (40%) of the revenues derived from the reinstatement fee under this subsection shall be deposited into the State Treasury as special revenues and credited to the Public Health Fund to be used exclusively for the Blood Alcohol Program of the Department of Health.

History. Acts 1993, No. 863, § 10; 1999, No. 1077, § 20; 2005, No. 1992, § 5; 2007, No. 712, § 4; 2009, No. 633, § 5.

Amendments. The 2009 amendment, in (a), inserted (a)(2), redesignated the remaining text accordingly, and made a minor punctuation change.

Subchapter 4 — Administrative Driver's License Suspension

SECTION.

5-65-402. Surrender of license or permit to arresting officer.

Effective Dates. Acts 2009, No. 956, § 34: Apr. 6, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that laws concerning juveniles need to be amended and updated; that the fair and efficient administration of juvenile law is highly important to society at large; and that this act is immediately necessary because the judiciary needs to begin addressing these changes in laws involving juveniles. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the

bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-65-402. Surrender of license or permit to arresting officer.

(a)(1)(A) At the time of arrest for violating § 3-3-203(a), § 5-27-503(a)(3), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5), the arrested person shall immediately surrender his or her license, permit, or other evidence of driving privilege to the arresting law enforcement officer.

(B) The arresting law enforcement officer shall seize the license, permit, or other evidence of driving privilege surrendered by the arrested person or found on the arrested person during a search.

(C)(i) If a juvenile, as defined in the Arkansas Juvenile Code of 1989, § 9-27-301 et seq., is arrested for violating § 3-3-203(a) or § 5-27-503(a)(3), the arresting officer shall issue the juvenile a citation to appear for a juvenile intake with a juvenile intake officer.

(ii) The arresting officer shall forward a copy of the citation and the license, permit, or other evidence of the driving privilege to the juvenile office before the scheduled juvenile intake.

(iii) Juveniles subject to the jurisdiction of the circuit court under § 9-27-301 et seq. shall not be subject to this section, except as provided in this subdivision (a)(1).

(2)(A)(i) If the license, permit, or other evidence of driving privilege seized by the arresting law enforcement officer has not expired and otherwise appears valid to the arresting law enforcement officer, the arresting law enforcement officer shall issue to the arrested person a dated receipt for that license, permit, or other evidence of driving privilege on a form prescribed by the Office of Driver Services.

(ii) This receipt shall be recognized as a license and authorizes the arrested person to operate a motor vehicle for a period not to exceed thirty (30) days.

(B)(i) The receipt form shall contain and shall constitute a notice of suspension, disqualification, or revocation of driving privileges by the office, effective in thirty (30) days, notice of the right to a hearing within twenty (20) days, and if a hearing is to be requested, as notice that the hearing request is required to be made within seven (7) calendar days of the notice being given.

(ii) The receipt shall also contain phone numbers and the address of the office and inform the driver of the procedure for requesting a hearing.

(C) If the office is unable to conduct a hearing within the twenty-day period, a temporary permit shall be issued and is valid until the date of the hearing.

(D)(i) The seized license, permit, or other evidence of driving privilege and a copy of the receipt form issued to the arrested person

shall be attached to the sworn report of the arresting law enforcement officer and shall be submitted by mail or in person to the office or its designated representative within seven (7) days of the issuance of the receipt.

(ii) The failure of the arresting law enforcement officer to timely file the sworn report does not affect the authority of the office to suspend, disqualify, or revoke the driving privilege of the arrested person.

(3)(A) Any notice from the office required under this subchapter that is not personally delivered shall be sent by certified mail and is deemed to have been delivered on the date when postmarked and shall be sent to the last known address on file with the office.

(B) Refusal of the addressee to accept delivery or attempted delivery of the notice at the address obtained by the arresting law enforcement officer or on file with the office does not constitute nonreceipt of notice.

(C) For any notice that is personally delivered, the person shall be asked to sign a receipt acknowledging he or she received the required notice.

(4)(A) The office or its designated official shall suspend, revoke, or disqualify the driving privilege of an arrested person or any nonresident driving privilege of an arrested person when it receives a sworn report from the arresting law enforcement officer that he or she had reasonable grounds to believe the arrested person:

(i) Was under twenty-one (21) years of age and purchased or was in possession of intoxicating liquor, wine, or beer in violation of § 3-3-203(a);

(ii) Was under twenty-one (21) years of age and attempted to purchase an alcoholic beverage or use a fraudulent or altered personal identification document for the purpose of purchasing an alcoholic beverage illegally or other material or substance restricted to adult purchase or possession under existing law in violation of § 5-27-503(a)(3); or

(iii) Had been operating or was in actual physical control of a motor vehicle in violation of § 5-65-103, § 5-65-303, § 27-23-114(a)(1), or § 27-23-114(a)(2) and the sworn report is accompanied by:

(a) A written chemical test report or a sworn report that the arrested person was operating or in actual physical control of a motor vehicle in violation of § 5-65-103, § 5-65-303, or § 27-23-114; or

(b) A sworn report that the arrested person refused to submit to a chemical test of blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of the arrested person's breath or blood in violation of § 5-65-205, § 5-65-310, or § 27-23-114(a)(5).

(B) The suspension, disqualification, or revocation shall be based as follows:

(i) The driving privileges of any person violating § 5-65-103 shall be suspended or revoked as provided by § 5-65-104;

(ii) The driving privileges of any person violating § 5-65-205(a) shall be suspended or revoked as provided by § 5-65-205(b);

(iii) The driving privileges of any person violating § 5-65-303 shall be suspended or revoked as provided by § 5-65-304(b);

(iv) The driving privileges of any person violating § 5-65-310(a) shall be suspended or revoked as provided by § 5-65-310(b);

(v) The driving privileges of any person violating § 27-23-114(a)(1) or § 27-23-114(a)(2) shall be disqualified as provided by § 27-23-112;

(vi) The driving privileges of any person violating § 27-23-114(a)(5) shall be disqualified as provided by § 27-23-112;

(vii) The driving privileges of any person violating § 3-3-203(a) shall be suspended, revoked, or disqualified as provided by § 3-3-203(e); and

(viii) The driving privileges of any person violating § 5-27-503(a)(3) shall be suspended, revoked, or disqualified as provided by § 5-27-503(d).

(5) In addition to any other penalty provided for in this section, if the arrested person is a resident without a license or permit to operate a motor vehicle in this state:

(A) The office shall deny to that arrested person the issuance of a license or permit for a period of six (6) months for a first offense; and

(B) For a second or subsequent offense by a resident without a license or permit to operate a motor vehicle, the office shall deny to that arrested person the issuance of a license or permit for a period of one (1) year.

(6)(A)(i) If the arrested person is a nonresident, the arrested person's privilege to operate a motor vehicle in Arkansas shall be suspended in the same manner as that of a resident.

(ii) The office shall notify the office that issued the nonresident's motor vehicle license of the action taken by the office.

(B) When the arrested person is a nonresident without a license or permit to operate a motor vehicle, the office shall notify the office of issuance for that arrested person's state of residence of action taken by the office.

(7)(A) Upon the written request of a person whose privilege to drive has been revoked, denied, disqualified, or suspended, or who has received a notice of revocation, suspension, disqualification, or denial by the arresting law enforcement officer, the office shall grant the person an opportunity to be heard if the request is received by the office within seven (7) calendar days after the notice of the revocation, suspension, disqualification, or denial is given in accordance with this section or as otherwise provided in this chapter.

(B) A request described in subdivision (a)(7)(A) of this section does not operate to stay the revocation, suspension, disqualification, or denial by the office until the disposition of the hearing.

(8)(A) The hearing shall be before the office or its authorized agent, in the office of the Revenue Division of the Department of Finance and Administration nearest the county where the alleged event

occurred for which the person was arrested, unless the office or its authorized agent and the arrested person agree otherwise to the hearing's being held in some other county or that the office or its authorized agent may schedule the hearing or any part of the hearing by telephone and conduct the hearing by telephone conference call.

(B) The hearing shall not be recorded.

(C) At the hearing, the burden of proof is on the state and the decision shall be based on a preponderance of the evidence.

(D) The scope of the hearing shall cover the issues of whether the arresting law enforcement officer had reasonable grounds to believe that the person:

(i) Had been operating or was in actual physical control of a motor vehicle or commercial motor vehicle while:

(a) Intoxicated or impaired;

(b) The person's blood alcohol concentration measured by weight of alcohol in the person's blood was equal to or greater than the blood alcohol concentration prohibited by § 5-65-103(b);

(c) The blood alcohol concentration of a person under twenty-one (21) years of age was equal to or greater than the blood alcohol concentration prohibited by § 5-65-303; or

(d) The person's blood alcohol concentration measured by weight of alcohol in the person's blood was equal to or greater than the blood alcohol concentration prohibited by § 27-23-114;

(ii) Refused to submit to a chemical test of the blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance contents of the person's breath or blood and whether the person was placed under arrest;

(iii) Was under twenty-one (21) years of age and purchased or was in possession of any intoxicating liquor, wine, or beer; or

(iv) Was under twenty-one (21) years of age and attempted to purchase an alcoholic beverage or use a fraudulent or altered personal identification document for the purpose of purchasing an alcoholic beverage illegally or other material or substance restricted to adult purchase or possession under existing law.

(E)(i) The office or its agent at the hearing shall consider any document submitted to the office by the arresting law enforcement agency, document submitted by the arrested person, and the statement of the arrested person.

(ii) The office shall not have the power to compel the production of documents or the attendance of witnesses.

(F)(i) If the revocation, suspension, disqualification, or denial is based upon a chemical test result indicating that the arrested person was intoxicated or impaired and a sworn report from the arresting law enforcement officer, the scope of the hearing shall also cover the issues as to whether:

(a) The arrested person was advised that his or her privilege to drive would be revoked, disqualified, suspended, or denied if the chemical test result reflected an alcohol concentration equal to or in

excess of the amount by weight of blood provided by law or the presence of other intoxicating substances;

(b) The breath, blood, saliva, or urine specimen was obtained from the arrested person within the established and certified criteria of the Department of Health;

(c) The chemical testing procedure used was in accordance with existing rules; and

(d) The chemical test result in fact reflects an alcohol concentration, the presence of other intoxicating substances, or a combination of alcohol concentration or other intoxicating substance.

(ii) If the revocation, suspension, disqualification, or denial is based upon the refusal of the arrested person to submit to a chemical test as provided in § 5-65-205, § 5-65-310, or § 27-23-114(a)(5), reflected in a sworn report by the arresting law enforcement officer, the scope of the hearing shall also include whether:

(a) The arrested person refused to submit to the chemical test; and

(b) The arrested person was informed that his or her privilege to drive would be revoked, disqualified, suspended, or denied if the arrested person refused to submit to the chemical test.

(b) After the hearing, the office or its authorized agent shall order the revocation, suspension, disqualification, or denial to be rescinded or sustained and shall then advise any person whose license is revoked, suspended, or denied that he or she may request a restricted permit as otherwise provided for by this chapter.

(c)(1)(A) A person adversely affected by the hearing disposition order of the office or its authorized agent may file a de novo petition for review within thirty (30) days in the circuit court in the county in which the offense took place.

(B) A copy of the decision of the office shall be attached to the petition.

(C) The petition shall be served on the Director of the Department of Finance and Administration under Rule 4 of the Arkansas Rules of Civil Procedure.

(2)(A) The filing of a petition for review does not stay or place in abeyance the decision of the office or its authorized agent.

(B) If the circuit court issues an order staying the decision or placing the decision in abeyance, the circuit court shall transmit a copy of the order to the office in the same manner that convictions and orders relating to driving records are sent to that office.

(C)(i) The circuit court shall hold a final hearing on the de novo review within one hundred twenty (120) days after the date that the order staying the decision or placing the decision in abeyance is entered.

(ii) The circuit court may conduct the final hearing by telephone conference with the consent of the parties.

(3) An administrative hearing held pursuant to this section is exempt from the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(4)(A) On review, the circuit court shall hear the case de novo in order to determine based on a preponderance of the evidence whether a ground exists for revocation, suspension, disqualification, or denial of the person's privilege to drive.

(B) If the results of a chemical test of blood, breath, saliva, or urine are used as evidence in the suspension, revocation, or disqualification of the person's privilege to drive, then the provisions of § 5-65-206 shall apply in the circuit court proceeding.

(d)(1) Any decision rendered at an administrative hearing held under this section shall have no effect on any criminal case arising from any violation of § 3-3-203(a), § 5-27-503(a)(3), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5).

(2) Any decision rendered by a court of law for a criminal case arising from any violation of § 3-3-203(a), § 5-27-503(a)(3), § 5-65-103, § 5-65-205, § 5-65-303, § 5-65-310, § 27-23-114(a)(1), § 27-23-114(a)(2), or § 27-23-114(a)(5) shall affect the administrative suspension, disqualification, or revocation of the driver's license as follows:

(A) A plea of guilty or nolo contendere or a finding of guilt by the court has no effect on any administrative hearing held under this section;

(B)(i) An acquittal on the charges or a dismissal of charges serves to reverse the suspension, disqualification, or revocation of the driver's license suspended or revoked under this section.

(ii) The office shall reinstate the person's driver's license at no cost to the person, and the charges shall not be used to determine the number of previous offenses when administratively suspending, disqualifying, or revoking the driving privilege of any arrested person in the future; and

(C) The office shall convert any initial administrative suspension or revocation of a driver's license for violating § 5-65-103 to a suspension or revocation for violating § 5-65-303, if the person is convicted of violating § 5-65-303 instead of § 5-65-103.

(e) Any person whose privilege to drive has been denied, suspended, disqualified, or revoked shall remain under the denial, suspension, disqualification, or revocation and remain subject to penalties as provided in § 5-65-105 until such time as that person applies for, and is granted by the office, reinstatement of the privilege to drive.

(f) The administrative suspension, disqualification, or revocation of a driver's license as provided for by this section is supplementary to and in addition to a suspension, disqualification, or revocation of a driver's license that is ordered by a court of competent jurisdiction for an offense under §§ 5-64-710, 5-65-116, and 27-16-914, or any other traffic or criminal offense in which a suspension, disqualification, or revocation of the driver's license is a penalty for the violation.

(g) [Repealed.]

(h)(1)(A) A person whose license is suspended or revoked pursuant to this section shall:

(i) Both:

(a) Furnish proof of attendance at and completion of the alcoholism treatment program, alcohol education program, or alcohol and driving education program required by § 5-65-104(b)(1) or § 5-65-307(a)(1) and, if applicable, at a victim impact panel as provided in § 5-65-121 before reinstatement of his or her suspended or revoked driver's license; and

(b) Pay any fee for reinstatement required under § 5-65-119, § 5-65-304, or, if applicable, § 5-65-121; or

(ii) Furnish proof of dismissal or acquittal of the charge on which the suspension or revocation is based.

(B) An application for reinstatement shall be made to the office.

(2) Even if a person has filed a de novo petition for review pursuant to subsection (c) of this section, the person is entitled to reinstatement of driving privileges upon complying with this subsection and is not required to postpone reinstatement until the disposition of the de novo review in circuit court has occurred.

(3) A person suspended under this section may enroll in an alcohol education program prior to disposition of the offense by the circuit court, district court, or city court, but is not entitled to any refund of a fee paid if the charge is dismissed or if the person is acquitted of the charge.

(i) Except as provided in subsection (a) of this section, this section shall not apply to juveniles subject to § 9-27-301 et seq.

History. Acts 1999, No. 1077, § 21; 2003, No. 541, §§ 2-5; 2005, No. 1535, § 2; 2005, No. 1768, § 6; 2007, No. 922, § 2; 2009, No. 748, § 32; 2009, No. 946, § 3; 2009, No. 956, §§ 2, 3; 2011, No. 610, § 1; 2013, No. 361, §§ 11, 12, 13, 14; 2013, No. 488, § 1.

A.C.R.C. Notes. Acts 2009, No. 956, § 3, purported to to add a subsection (i) to Title 5, Chapter 65, Subchapter 4. However, the apparent intent was to add a subsection (i) to § 5-65-402.

Amendments. The 2009 amendment by No. 748 deleted (g).

The 2009 amendment by No. 946, in (h)(1)(A)(i), inserted "and, if applicable, at a victim impact panel as provided in § 5-65-121" in (h)(1)(A)(i)(a), inserted "or, if applicable, § 5-65-121" in (h)(1)(A)(i)(b), and made related changes.

The 2009 amendment by No. 956 inserted (a)(1)(C); and added (i).

The 2011 amendment added (c)(1)(C).

The 2013 amendment by No. 361, in (a)(4)(A)(iii)(*b*) and (a)(8)(D)(ii), inserted "saliva," "concentration" and "breath or"; added "saliva" in (a)(8)(F)(i)(*b*) and (c)(4)(B).

The 2013 amendment by No. 488 substituted "§ 3-3-203(e)" for "§ 3-3-203(c)" in (a)(4)(B)(vii).

CASE NOTES

Analysis

Constitutionality.
Sufficiency of Notice.

Constitutionality.

This section was not unconstitutional as applied to the driver where the hearing officer testified she considered the letter from the driver's doctor and the driver's final de novo hearing was held seventy days after the stay was granted by the circuit court, well within the 120 day limit imposed under subdivision (c)(2)(C)(i) of

this section. Miller v. Ark. Dep't of Fin. & Admin., 2012 Ark. 165, — S.W.3d — (2012).

Sufficiency of Notice.

Notice given to a DWI defendant that he was required to request a hearing on his license suspension within seven days was sufficient, although this section and § 5-65-403 specified that the hearing be requested within seven calendar days, because defendant filed his request timely and was given an opportunity to be heard. Robinette v. Dep't of Fin. & Admin., 2011 Ark. 349, — S.W.3d — (2011).

5-65-403. Notice and receipt from arresting officer.

CASE NOTES

Sufficiency of Notice.

Notice given to a DWI defendant that he was required to request a hearing on his license suspension within seven days was sufficient, although § 5-65-402 and this section specified that the hearing be requested within seven calendar days, because defendant filed his request timely and was given an opportunity to be heard. Robinette v. Dep't of Fin. & Admin., 2011 Ark. 349, — S.W.3d — (2011).

CHAPTER 66

GAMBLING

Effective Dates. Acts 2009, Nos. 605 and 606, § 27: Mar. 25, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the people of the State of Arkansas overwhelmingly approved the establishment of lotteries at the 2008 General Election; that lotteries will provide funding for scholarships to the citizens of this state; that the failure to immediately implement this act will cause a reduction in lottery proceeds that will harm the educational and economic success of potential students eligible to receive scholarships under the act; and that the state lotteries should be implemented as soon as possible to effectuate the will of the citizens of this state and implement lottery-funded scholarships as soon as possible. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-66-102. [Repealed.]

Publisher's Notes. This section, concerning the duties of certain officers regarding gambling violators, was repealed by Acts 2013, No. 1348, § 14. The section was derived from Rev. Stat., ch. 44, div. 6, art. 3, § 9; C. & M. Dig., § 2642; Pope's Dig., § 3332; A.S.A. 1947, § 41-3264.

5-66-103. Gambling houses.

(a) A person commits the offense of keeping a gambling house if the person:

(1) Keeps, conducts, or operates, or who is interested directly or indirectly in keeping, conducting, or operating any gambling house or place where gambling is carried on;

(2) Sets up, keeps, or exhibits or causes to be set up, kept, or exhibited or assists in setting up, keeping, or exhibiting any gambling device; or

(3) Is interested directly or indirectly in running any gambling house or in setting up and exhibiting any gambling device, either by furnishing money or another article, for the purpose of carrying on any gambling house.

(b) Keeping a gambling house is a Class D felony.

History. Acts 1913, No. 152, §§ 1, 2; C. & M. Dig., §§ 2632, 2633; Pope's Dig., §§ 3322, 3323; A.S.A. 1947, §§ 41-3251, 41-3252; Acts 2005, No. 70, § 1; 2007, No. 555, § 1; No. 827, § 82.

A.C.R.C. Notes. This section was amended by Acts 2007, No. 827, § 82. However, pursuant to Acts 2007, No. 827, § 240, this section is set out as amended by Acts 2007, No. 555, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Recent Development: Gambling, 58 Ark. L. Rev. 283.

5-66-104. Gaming devices — Prohibition.

(a) It is unlawful for a person to set up, keep, or exhibit any gaming table or gambling device, commonly called "A. B. C.", "E. O.", roulette, or rouge et noir, any faro bank, or any other gaming table or gambling device, or bank of the like or similar kind, or of any other description although not named in this section, regardless of the name or denomination, either:

(1) Adapted, devised, or designed for the purpose of playing any game of chance; or

(2) At which any money or property may be won or lost.

(b) Upon conviction, a person who violates this section is guilty of an unclassified misdemeanor and shall be fined in any sum not less than one hundred dollars ($100) and may be imprisoned any length of time not less than thirty (30) days nor more than one (1) year.

History. Rev. Stat., ch. 44, div. 6, art. 3, § 1; C. & M. Dig., § 2630; Pope's Dig., § 3320; A.S.A. 1947, § 41-3253; Acts 2009, No. 748, § 33.

Amendments. The 2009 amendment added the subsection designations throughout; in (a), substituted "It is unlawful for a person to set up, keep, or exhibit" for "Any person who sets up, keeps, or exhibits", deleted "or" preceding "any faro bank", substituted "regardless of" for "be" and "either" for "what it may"; in (b), added "Upon conviction, a person who violates this section", deleted "deemed" preceding "guilty", substituted "an unclassified" for "a", and deleted "on conviction" preceding "shall be fined"; and made minor stylistic changes.

5-66-105. Gaming devices — Financial interest.

(a) It is unlawful for any person in any way, either directly or indirectly, to be:

(1) Interested or concerned in any gaming prohibited by § 5-66-104, either by furnishing money or another article for the purpose of carrying on gaming; or

(2) Interested in the loss or gain of gaming prohibited by § 5-66-104.

(b) Upon conviction, a person who violates this section is guilty of an unclassified misdemeanor and shall be fined in any sum not less than one hundred dollars ($100) and may be imprisoned any length of time not less than thirty (30) days nor more than one (1) year.

History. Rev. Stat., ch. 44, div. 6, art. 3, § 2; C. & M. Dig., § 2631; Pope's Dig., § 3321; A.S.A. 1947, § 41-3254; Acts 2007, No. 827, § 83.

5-66-106. Gaming devices — Betting.

(a) It is unlawful for any person to bet any money or other valuable thing or any representative of any thing that is esteemed of value on any game prohibited by § 5-66-104.

(b) Upon conviction, a person who violates this section is guilty of a violation and shall be fined in any sum not exceeding one hundred dollars ($100) nor less than fifty dollars ($50.00).

History. Rev. Stat., ch. 44, div. 6, art. 3, § 3; C. & M. Dig., § 2634; Pope's Dig., § 3324; A.S.A. 1947, § 41-3255; Acts 2007, No. 827, § 84.

5-66-107. Gaming devices — In buildings or on vessels.

(a) It is unlawful for any owner or occupant of any house, outbuilding, or other building or any steamboat, or other vessel to knowingly permit or suffer any games, tables, or banks mentioned in § 5-66-104 or permit or suffer any kind of gaming under any name, to be carried on or exhibited in his or her house, outbuilding, or other building, or on board of any steamboat, flatboat, keelboat, or other vessel on any of the waters within this state.

(b) Upon conviction, a person who violates this section is guilty of an unclassified misdemeanor and shall be fined in any sum not less than one hundred dollars ($100) and may be imprisoned any length of time not less than thirty (30) days nor more than one (1) year.

History. Rev. Stat., ch. 44, div. 6, art. 3, § 4; C. & M. Dig., § 2635; Pope's Dig., § 3325; A.S.A. 1947, § 41-3256; Acts 2007, No. 827, § 85.

5-66-108. [Repealed.]

Publisher's Notes. This section, concerning search warrants for gaming devices, was repealed by Acts 2013, No. 1348, § 15. The section was derived from Rev. Stat., ch. 44, div. 6, art. 3, §§ 6, 7; C. & M. Dig., §§ 2637, 2638; Pope's Dig., §§ 3327, 3328; A.S.A. 1947, §§ 41-3259, 41-3260.

5-66-109. [Repealed.]

Publisher's Notes. This section, concerning gaming devices and vagrants, was repealed by Acts 2013, No. 1348, § 16. The section was derived from Rev. Stat., ch. 44, div. 6, art. 3, § 5; Rev. Stat., ch. 154, § 2; C. & M. Dig., §§ 2636, 2802; Pope's Dig., §§ 3326, 3506; A.S.A. 1947, §§ 41-3257, 41-3258.

5-66-110. Keno, etc.

(a) If a person sets up or exhibits, causes to be set up or exhibited, or aids or assists in setting up or exhibiting in the state any gaming device commonly known and designated as "keno" or any similar device by any other name or without a name, upon conviction the person is guilty of a violation and shall be fined in any sum not less than two hundred dollars ($200) for benefit of the common school fund.

(b)(1) It is the duty of each prosecuting attorney in this state who knows or is informed of any person exhibiting or setting up, or aiding or assisting in setting up any device described in subsection (a) of this section in his or her district, to take immediate steps to have the person immediately arrested for trial, and the prosecuting attorney shall have the person arrested as provided in this subsection for each separate offense done or committed on every separate day.

(2) If any prosecuting attorney who knows or is informed of any violation of this section refuses or neglects to cause the arrest and trial of the person so offending within five (5) days next after he or she knows or is informed of the offense, upon indictment and conviction, the prosecuting attorney shall be fined in any sum not less than five hundred dollars ($500).

(c)(1) It is the duty of every justice of the peace, knowing or being informed of any violation of subsection (a) of this section, in his or her township, for which the person has not been arrested or tried under the provisions of this section, to cause the arrest and trial of the person so offending, for each separate offense done or committed against the provisions of this section.

(2) If any justice of the peace who knows or is informed of any violation of subsection (a) of this section in his or her township refuses or neglects to cause the arrest and trial of the person so violating subsection (a) of this section, within five (5) days next after he or she is informed of the same, the justice of the peace is guilty of a misfeasance in office, and, upon indictment and conviction, the circuit court shall remove him or her from office.

(d) No license granted by any city or town is a bar to any prosecution or conviction under a provision of this section or any excuse, protection,

or justification for any justice of the peace or prosecuting attorney failing to carry out the same.

History. Acts 1877, No. 71, §§ 1-5, 7, p. 70; C. & M. Dig., §§ 2646-2651; Pope's Dig., §§ 3336-3341; A.S.A. 1947, §§ 41-3266 — 41-3271; Acts 2009, No. 748, § 34.

Amendments. The 2009 amendment removed the subdivision designations from (a), substituted "violation" for "misdemeanor," and made minor stylistic changes.

5-66-112. Card games — Betting.

If a person bets any money or any valuable thing on any game of brag, bluff, poker, seven-up, three-up, twenty-one, vingt-et-un, thirteen cards, the odd trick, forty-five, whist, or at any other game of cards known by any name now known to the law or with any other or new name or without any name, upon conviction he or she is guilty of a violation and shall be fined in any sum not less than ten dollars ($10.00) nor more than twenty-five dollars ($25.00).

History. Rev. Stat., ch. 44, div. 6, art. 3, § 8; C. & M. Dig., § 2639; Pope's Dig., § 3329; A.S.A. 1947, § 41-3261; Acts 2009, No. 748, § 35.

Amendments. The 2009 amendment inserted "is guilty of a violation and" and made minor stylistic changes.

5-66-113. Games of hazard or skill — Betting.

(a) If a person bets any money or any valuable thing on any game of hazard or skill, upon conviction he or she is guilty of a violation and shall be fined in any sum not less than ten dollars ($10.00) nor more than twenty-five dollars ($25.00).

(b) In prosecuting under subsection (a) of this section it is sufficient for the indictment to charge that the defendant bet money or another valuable thing on a game of hazard or skill, without stating with whom the game was played.

History. Acts 1855, §§ 1, 2, p. 270; C. & M. Dig., §§ 2640, 2641; Pope's Dig., §§ 3330, 3331; A.S.A. 1947, §§ 41-3262, 41-3263; Acts 2009, No. 748, § 36.

Amendments. The 2009 amendment inserted "is guilty of a violation and" and made minor stylistic changes.

5-66-115. Sports or games — Bribery of participants.

(a) As used in this section:

(1) "Participant" means any:

(A) Professional or amateur baseball, football, basketball, hockey, polo, tennis, or other athletic player;

(B) Boxer;

(C) Jockey, driver, groom, or other person participating or expecting to participate in a horse race, including an owner of a race track or the owner's employee, steward, trainer, judge, starter, or special police officer; or

(D) Manager, coach, or trainer of any sport team or participant or prospective participant in any sport team, sport game, or sport contest; and

(2) "Sport" means any:

(A) Professional or amateur baseball, football, basketball, hockey, polo, tennis, or other athletic game or contest;

(B) Boxing match; or

(C) Horse race.

(b) It is unlawful for any person to give, promise, or offer to any participant in any sport any valuable thing with the purpose to influence the participant to lose or try to lose or cause to be lost or to limit the participant's or the participant's team's margin of victory in a sport in which the participant is taking part or expects to take part or has any duty or connection.

(c) It is unlawful for any participant to solicit or accept any valuable thing to influence the participant to lose or try to lose or cause to be lost or to limit the participant's or the participant's team's margin of victory in a sport in which the participant is taking part or expects to take part or has any duty or connection.

(d) Upon conviction, any person who violates this section is guilty of a Class D felony.

History. Acts 1951, No. 250, § 1; 1975, No. 928, § 9; A.S.A. 1947, § 41-3288; Acts 2007, No. 827, § 86.

5-66-116. Horseracing — Betting.

(a) It is unlawful to directly or indirectly bet in this state, by selling or buying pools or otherwise, any money or other valuable thing, on any horse race of any kind whether had or run in this state or out of this state.

(b)(1) Upon conviction, a person who violates subsection (a) of this section is guilty of:

(A) A violation for the first offense and shall be fined in any sum not less than ten dollars ($10.00) nor more than twenty-five dollars ($25.00);

(B) A violation for the second offense and shall be fined in any sum not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100); and

(C) An unclassified misdemeanor for all offenses after the second offense and shall be fined in any sum not more than five hundred dollars ($500) and imprisoned for a term of not less than thirty (30) days nor more than six (6) months.

(2) Every bet, wager, sale of pools, or purchase of pools is deemed a separate offense.

(c) It is the duty of circuit judges and prosecuting attorneys of this state, the grand juries and mayors of the cities and towns of this state, the police officers and marshals of the cities and towns, and the justices of the peace, sheriffs, and constables to enforce the provisions of this

section when this section is violated in their presence or when the information of the violation is brought to their knowledge by affidavit or otherwise.

(d) If any sheriff, constable, or police officer refuses or neglects to immediately arrest and bring before some court of competent jurisdiction for trial any person who violates this section, when the knowledge of the violation is brought to his or her attention by the affidavit of any resident of the county where the offense is committed, the sheriff, constable, or police officer is deemed guilty of nonfeasance in office and upon conviction shall be fined in any sum not more than five hundred dollars ($500) and shall be removed from office.

History. Acts 1907, No. 55, §§ 1-4, p. 134; C. & M. Dig., §§ 2669-2672; Pope's Dig., §§ 3355-3358; A.S.A. 1947, §§ 41-3278 — 41-3281; Acts 2009, No. 748, § 37.

Amendments. The 2009 amendment, in (b)(1), deleted "a misdemeanor and" following "guilty of" in the introductory language, inserted "A violation for" in (b)(1)(A) and (b)(1)(B), corrected a misspelling in (b)(1)(B), in (b)(1)(C) inserted "An unclassified misdemeanor for" and deleted "in the county jail" following "imprisoned," and made minor stylistic changes.

5-66-117. Horseracing — Agency service wagering.

(a)(1) It is unlawful for any person, either for himself or herself or as agent or employee of another person, to place, offer, or agree to place, either in person or by messenger, telephone, or telegraph, a wager on behalf of another person, for a consideration paid or to be paid by or on behalf of the other person, on a thoroughbred horse race being conducted in or out of this state.

(2) Upon conviction, a person who violates subdivision (a)(1) of this section is guilty of a Class D felony.

(b) It is a defense to prosecution under this section if a defendant can prove that his or her wager on behalf of another person was:

(1) Of a casual nature with no profit motive; and

(2) Merely an accommodation to the other person.

History. Acts 1977, No. 791, §§ 1, 2; A.S.A. 1947, §§ 41-3203, 41-3204; Acts 2007, No. 827, § 87.

5-66-118. Lottery, etc. — Tickets.

(a) Except as authorized under the Charitable Bingo and Raffles Enabling Act, § 23-114-101 et seq., it is unlawful for a person to:

(1) Keep an office, room, or place for the sale or disposition of a lottery ticket or slip, policy ticket or slip, gift concert ticket or slip, or like device;

(2) Vend, sell, or otherwise dispose of any lottery ticket or slip, policy ticket or slip, gift concert ticket or slip, or like device;

(3) Possess any lottery ticket or slip, policy ticket or slip, or gift concert ticket or slip, or like device, except a lottery ticket issued in another state where a lottery is legal; or

(4) Be interested, either directly or indirectly, in the sale or disposition of any lottery ticket or slip, policy ticket or slip, or gift concert ticket or slip, or like device.

(b) In any prosecution or investigation under this section, it is no exemption for a witness that his or her testimony may incriminate himself or herself, but no such testimony given by the witness shall be used against him or her in any prosecution except for perjury, and the witness is discharged from liability for any violation of the law upon his or her part disclosed by his or her testimony.

(c)(1) The General Assembly recognizes that:

(A) The present laws relating to lotteries are vague in certain areas and, although designed to prohibit the operation of lotteries in the state, may be interpreted to prohibit even the printing of lottery tickets by companies in this state for distribution in other states where lotteries are legal;

(B) There are companies in this state that print various types of tickets, stamps, tags, coupon books, and similar devices and that may be interested in printing lottery tickets for states where lotteries are lawful; and

(C) It is the intent and purpose of this subsection to clarify the present law relating to lotteries to specifically permit businesses in Arkansas to print lottery tickets for use in states where lotteries are lawful.

(2)(A) The printing or other production of lottery tickets by a business located in Arkansas for use in a state where a lottery is permitted is declared to be lawful.

(B) Nothing contained in this section and § 5-66-119 or any other law shall be construed to make printing or production of lottery tickets described in subdivision (c)(2)(A) of this section unlawful.

(d)(1) Upon conviction, any person who violates this section is guilty of a violation and shall be fined an amount not to exceed ten thousand dollars ($10,000).

(2) A second or subsequent offense is a Class D felony.

History. Acts 1939, No. 209, §§ 1-6; A.S.A. 1947, §§ 41-3272 — 41-3277; Acts 1987, No. 835, §§ 1, 2; 1993, No. 1053, § 1; 2007, No. 388, § 2; 2009, No. 748, §§ 38, 39.

Amendments. The 2009 amendment inserted "ticket or slip" or substituted "ticket or slip" for "ticket, slip" throughout the section; substituted "a violation" for "an unclassified misdemeanor" in (d)(1); and made related and minor stylistic changes.

5-66-120. Application to Arkansas Scholarship Lottery Act.

This chapter does not apply to a lottery under the Arkansas Scholarship Lottery Act, § 23-115-101 et seq.

History. Acts 2009, No. 605, § 2; 2009, No. 606, § 2.

CHAPTER 67

HIGHWAYS AND BRIDGES

SECTION.

5-67-102. False or misleading signs.

(a) It is unlawful for any person, firm, or corporation to erect or cause to be erected or maintained on or within one hundred yards (100 yds.) of the right-of-way of any state highway any sign or billboard that has printed, painted, or otherwise placed on the sign or billboard words or figures:

(1) Calculated to cause the traveling public of this state or tourists from other states to abandon the state highway and travel any public road to any town, city, or destination in this state unless the sign or billboard is erected and maintained by and with the consent and approval of the State Highway Commission; or

(2) That give to the traveling public any false or misleading information pertaining to the highways of this state.

(b) Any person, firm, or corporation violating a provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100).

(c) The commission shall remove and destroy any signboard within one hundred yards (100 yds.) of the right-of-way of any state highway that gives to the traveling public any false or misleading information pertaining to the highways of this state.

History. Acts 1925, No. 135, §§ 1-4; Pope's Dig., §§ 3660-3663; A.S.A. 1947, §§ 41-3351 — 41-3354; Acts 2005, No. 1994, § 54; Acts 2007, No. 827, § 88.

CHAPTER 68

OBSCENITY

SUBCHAPTER.

Subchapter 2 — Offenses Generally

SECTION.

5-68-205. Public display of obscenity.

(a)(1) As used in this subsection:

(A) "Obscene" means the same as "obscene material" defined by § 5-68-302; and

(B) "Obscenity" means an obscene sticker, painting, decal, emblem, or other device that is or contains an obscene writing, description, photograph, or depiction.

(2) A person commits the offense of publicly displaying an obscenity if the person knowingly causes an obscenity to be displayed in a manner that is readily visible to the public and the obscenity's content or character is distinguishable by normal vision.

(3) Publicly displaying an obscenity is a Class B misdemeanor.

(b)(1) It is unlawful to publicly display obscene material as defined by § 5-68-302 on any motor vehicle or wearing apparel.

(2) A violation of this subsection is a Class C misdemeanor.

History. Acts 1989, No. 200, § 1; 1989, No. 584, § 1; 2007, No. 827, §§ 89, 90.

Subchapter 5 — Selling or Loaning Pornography to Minors

SECTION.

5-68-501. Definitions.

CASE NOTES

Constitutionality.

Based upon responses from questions certified to the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 6-8, a federal district court found that § 5-68-502 effectively stifled the access of adults and older minors to communications and material they were entitled to receive and view under U.S. Const. amends. I and XIV. Shipley, Inc. v. Long, 454 F. Supp. 2d 819 (E.D. Ark. 2004).

5-68-502. Unlawful acts.

It is unlawful for any person, including, but not limited to, any person having custody, control, or supervision of any commercial establishment, to knowingly:

(1)(A) Display material that is harmful to minors in such a way that the material is exposed to the view of a minor as part of the invited general public.

(B) However, a person is deemed not to have displayed material harmful to minors if:

(i) The material is kept behind devices commonly known as "blinder racks" so that the lower two-thirds (⅔) of the material is not exposed to view; or

(ii) Material harmful to minors is not contained on the front cover, back cover, or binding of the displayed material;

(2)(A) Sell, furnish, present, distribute, allow to view, or otherwise disseminate to a minor with or without consideration any material that is harmful to minors.

(B) However, the prohibition under subdivision (2)(A) of this section does not apply to any dissemination:

(i) By a parent, guardian, or relative within the third degree or consanguinity of the minor; or

(ii) With the consent of a parent or guardian of the minor; or

(3)(A) Present to a minor or participate in presenting to a minor with or without consideration any performance that is harmful to minors.

(B) However, the prohibition under subdivision (3)(A) of this section does not apply to any dissemination:

(i) By a parent, guardian, or relative within the third degree of consanguinity to the minor; or

(ii) With the consent of a parent or guardian of the minor.

History. Acts 1969, No. 133, § 2; A.S.A. 1947, § 41-3582; Acts 1999, No. 1263, § 2; 2003, No. 858, § 1; 2007, No. 579, § 1.

CASE NOTES

Constitutionality.

Based upon responses from questions certified to the Arkansas Supreme Court pursuant to Ark. Sup. Ct. R. 6-8, a federal district court found that this section effectively stifled the access of adults and older minors to communications and material they were entitled to receive and view under U.S. Const. amends. I and XIV. Shipley, Inc. v. Long, 454 F. Supp. 2d 819 (E.D. Ark. 2004).

CHAPTER 69

OIL AND GAS

SECTION.

5-69-102. Carbon black.

(a) The use of natural gas within the State of Arkansas for the purpose of obtaining the carbon black content by the process of burning is prohibited.

(b) The erection, enlargement, maintenance, and operation of any plant in the State of Arkansas for the purpose of burning natural gas to obtain from the natural gas the carbon black content is prohibited within this state.

(c) No person, firm, or corporation owning or operating any gas well within this state shall:

(1) Use any part of the gas produced from the gas well for the purpose of obtaining the carbon black content of the gas by the process of burning; or

(2) Sell or deliver any part of the gas produced from the gas well to any other person, firm, or corporation for use by that person, firm, or corporation in obtaining the carbon black content of the gas by the process of burning the gas.

(d)(1) The erection, maintenance, or operation of any carbon black plant in violation of this section or the use, sale, or delivery of any natural gas from any gas well in this state in violation of a provision of this section is declared a public nuisance.

(2) The Attorney General and the several prosecuting attorneys of this state shall proceed in the name of the State of Arkansas in any court of competent jurisdiction by injunction, mandamus, or other appropriate remedy for the abatement of a public nuisance under subdivision (d)(1) of this section.

(e)(1) Any person, firm, or corporation violating any provision of this section is guilty of a violation and upon conviction shall be fined in any sum not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000).

(2) Each day that any plant is operated for the purpose of manufacturing carbon black or each day that any gas is used, sold, or delivered from any gas well in violation of a provision of this section is deemed a separate offense.

(f) Nothing in this section shall be construed as prohibiting the use of casing-head gas, produced from any oil well, in the manufacture of carbon black.

History. Acts 1925, No. 350, §§ 1-6; Pope's Dig., §§ 3122-3127; A.S.A. 1947, §§ 41-3653 — 41-3658; Acts 2005, No. 1994, § 56; 2007, No. 827, § 91.

5-69-103. Pipelines and pipeline facilities.

(a) A person upon conviction is guilty of a Class D felony if the person knowingly violates:

(1) § 14-271-110(a);

(2) An order, safety standard, rule, or regulation of the Arkansas Public Service Commission pursuant to § 23-15-205;

(3) § 23-15-206(b);

(4) § 23-15-206(c);

(5) § 23-15-208(a); or

(6) § 23-15-209(a).

(b) A person upon conviction is guilty of a Class D felony if the person knowingly violates § 14-271-112(a) and:

(1) With respect to the violation, damages or destroys an interstate or intrastate natural gas pipeline facility that results in serious physical injury or actual damage to property of more than fifty thousand dollars ($50,000);

(2) With respect to the violation, damages or destroys an interstate or intrastate natural gas pipeline facility, knows or has reason to know of the damage or destruction, and does not report the damage or destruction promptly to the operator of the interstate or intrastate natural gas pipeline facility or to local law enforcement authorities; or

(3) With respect to the violation, damages an intrastate hazardous liquid pipeline facility that results in the release of more than fifty (50) barrels of hazardous liquid.

(c)(1) A person who knowingly engages in the unauthorized disposal of solid waste within the right-of-way of an interstate or intrastate pipeline facility or an interstate or intrastate hazardous liquid pipeline facility upon conviction is guilty of a Class D felony.

(2)(A) As used in this subsection, "solid waste" means garbage, refuse, or sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including without limitation solid, liquid, semisolid, or contained gaseous material resulting from industrial operations, commercial operations, mining operations, agricultural operations, or other community activities.

(B) "Solid waste" does not include solid or dissolved material in domestic sewage or solids discovered in materials in irrigation return flows or industrial discharges that are point sources subject to permits under 33 U.S.C. § 1342, as it existed on January 1, 2013, or source, special nuclear, or byproduct material as defined by 42 U.S.C. § 2011 et seq., as it existed on January 1, 2013.

(d) A person who knowingly damages or destroys an interstate or intrastate pipeline facility or an interstate or intrastate hazardous liquid pipeline facility upon conviction is guilty of a:

(1) Class A misdemeanor if the amount of actual damage is one thousand dollars ($1,000) or less;

(2) Class D felony if the amount of actual damage is more than one thousand dollars ($1,000) but less than five thousand dollars ($5,000);

(3) Class C felony if the amount of actual damage is more than five thousand dollars ($5,000) but less than twenty-five thousand dollars ($25,000); or

(4) Class B felony if the amount of actual damage is more than twenty-five thousand dollars ($25,000).

(e) A person who knowingly tampers with, damages, or destroys a pipeline sign or right-of-way marker required by law or rule of the state upon conviction is guilty of a:

(1) Class A misdemeanor if the amount of actual damage is one thousand dollars ($1,000) or less;

(2) Class D felony if the amount of actual damage is more than one thousand dollars ($1,000) but less than five thousand dollars ($5,000);

(3) Class C felony if the amount of actual damage is more than five thousand dollars ($5,000) but less than twenty-five thousand dollars ($25,000); or

(4) Class B felony if the amount of actual damage is more than twenty-five thousand dollars ($25,000).

History. Acts 2013, No. 1343, § 4; 2013, No. 1344, § 5.

A.C.R.C. Notes. Pursuant to § 1-2-207(b), this section is set out as enacted by Acts 2013, No. 1344, § 5.

CHAPTER 70
PROSTITUTION

SECTION.

5-70-101. Definitions.

CASE NOTES

Sexual Activity.

Where defendant advertised "erotic services" on the Internet, she met an undercover officer at a hotel, and stroked his penis during the course of performing a massage; the officer's testimony was sufficient to meet the requirements of this section for showing sexual activity through sexual contact. Defendant was properly convicted of prostitution under § 5-70-102, and sentenced to non-reporting probation for six months. Arrigo v. State, 2009 Ark. App. 568, 337 S.W.3d 560 (2009).

5-70-102. Prostitution.

(a) A person commits prostitution if in return for or in expectation of a fee he or she engages in or agrees or offers to engage in sexual activity with any other person.

(b) Prostitution is a:

(1) Class B misdemeanor for the first offense; and

(2) Class A misdemeanor for a second or subsequent offense under this section.

(c) It is an affirmative defense to prosecution that the person engaged in an act of prostitution as a result of being a victim of trafficking of persons, § 5-18-103.

(d) In addition to any other sentence authorized by this section, a person who violates this section by offering to pay, agreeing to pay, or paying a fee to engage in sexual activity upon conviction shall be ordered to pay a fine of two hundred fifty dollars ($250) to be deposited into the Safe Harbor Fund for Sexually Exploited Children.

History. Acts 1975, No. 280, § 3002; 1981, No. 816, § 1; 1983, No. 414, § 1; A.S.A. 1947, § 41-3002; Acts 2013, No. 132, § 4; 2013, No. 133, § 4; 2013, No. 1257, § 5.

A.C.R.C. Notes. Acts 2013, No. 133, § 1, provided: "This act shall be cited as the 'Arkansas Human Trafficking Act of 2013'."

Acts 2013, No. 1257, § 1, provided: "Legislative findings.

"The General Assembly finds that:

"(1) The criminal justice system is not the appropriate place for sexually exploited children because it serves to retraumatize them and to increase their feelings of low self-esteem;

"(2) Both federal and international law recognize that sexually exploited children are the victims of crime and should be treated as such;

"(3) Sexually exploited children should, when possible, be diverted into services that address the needs of these children outside of the justice system; and

"(4) Sexually exploited children deserve the protection of child welfare services, including diversion, crisis intervention, counseling, and emergency housing services."

Acts 2013, No. 1257, § 2, provided: "Legislative intent.

"(1) The intent of this act is to protect a child from further victimization after the child is discovered to be a sexually exploited child by ensuring that a child protective response is in place in the state.

"(2) This is to be accomplished by presuming that any child engaged in prostitution or solicitation is a victim of sex trafficking and providing these children with the appropriate care and services when possible.

"(3) In determining the need for and capacity of services that may be provided, the Department of Human Services shall recognize that sexually exploited children have separate and distinct service needs according to gender, and every effort should be made to ensure that these children are not prosecuted or treated as juvenile delinquents, but instead are given the appropriate social services."

Amendments. The 2013 amendment by identical acts Nos. 132 and 133 substituted "a second or subsequent offense under this section" for "second and subsequent offenses" in (b)(2); and added (c).

The 2013 amendment by No. 1257 added (d).

CASE NOTES

Sufficient Evidence.

Where defendant advertised "erotic services" on the Internet, she met an undercover officer at a hotel, and stroked his penis during the course of performing a massage; the officer's testimony was sufficient to show sexual activity through sexual contact as defined by § 5-14-101. Defendant was properly convicted of prostitution in violation of this section, and sentenced to non-reporting probation for six months. Arrigo v. State, 2009 Ark. App. 568, 337 S.W.3d 560 (2009).

5-70-103. Sexual solicitation.

(a) A person commits the offense of sexual solicitation if he or she:

(1) Offers or agrees to pay a fee to a person to engage in sexual activity with him or her or another person; or

(2) Solicits or requests a person to engage in sexual activity with him or her in return for a fee.

(b) Sexual solicitation is a:

(1) Class B misdemeanor for the first offense; and

(2) Class A misdemeanor for a second or subsequent offense.

(c) It is an affirmative defense to prosecution under this section that the person engaged in an act of sexual solicitation as a result of being a victim of trafficking of persons, § 5-18-103.

(d) In addition to any other sentence authorized by this section, a person who violates this section by offering to pay, agreeing to pay, or paying a fee to engage in sexual activity upon conviction shall be ordered to pay a fine of two hundred fifty dollars ($250) to be deposited into the Safe Harbor Fund for Sexually Exploited Children.

History. Acts 1975, No. 280, § 3003; A.S.A. 1947, § 41-3003; Acts 1999, No. 591, § 1; 2009, No. 428, § 1; 2013, No. 132, § 5; 2013, No. 133, § 5; 2013, No. 1157, § 4; 2013, No. 1257, § 6.

A.C.R.C. Notes. Acts 2013, No. 133, § 1, provided: "This act shall be cited as the 'Arkansas Human Trafficking Act of 2013'."

Acts 2013, No. 1257, § 1, provided: "Legislative findings.

"The General Assembly finds that:

"(1) The criminal justice system is not the appropriate place for sexually ex-

ploited children because it serves to retraumatize them and to increase their feelings of low self-esteem;

"(2) Both federal and international law recognize that sexually exploited children are the victims of crime and should be treated as such;

"(3) Sexually exploited children should, when possible, be diverted into services that address the needs of these children outside of the justice system; and

"(4) Sexually exploited children deserve the protection of child welfare services, including diversion, crisis intervention, counseling, and emergency housing services."

Acts 2013, No. 1257, § 2, provided: "Legislative intent.

"(1) The intent of this act is to protect a child from further victimization after the child is discovered to be a sexually exploited child by ensuring that a child protective response is in place in the state.

"(2) This is to be accomplished by presuming that any child engaged in prostitution or solicitation is a victim of sex trafficking and providing these children with the appropriate care and services when possible.

"(3) In determining the need for and capacity of services that may be provided, the Department of Human Services shall recognize that sexually exploited children have separate and distinct service needs according to gender, and every effort should be made to ensure that these children are not prosecuted or treated as juvenile delinquents, but instead are given the appropriate social services."

Amendments. The 2009 amendment substituted "sexual solicitation" for "patronizing a prostitute" in (a) and (b); rewrote (a)(1); and made minor stylistic changes.

The 2013 amendment by identical acts Nos. 132 and 133 substituted "a second or subsequent offense" for "the second and subsequent offenses" in (b)(2); and added (c).

The 2013 amendment by No. 1157 inserted "or agrees" in (a)(1).

The 2013 amendment by No. 1257 added (d).

CHAPTER 71

RIOTS, DISORDERLY CONDUCT, ETC.

SUBCHAPTER.

Subchapter 1 — General Provisions

5-71-101. Definitions.

CASE NOTES

Cited: Giron v. City of Alexander, 693 F. Supp. 2d 904 (E.D. Ark. 2010).

Subchapter 2 — Offenses Generally

SECTION.

Preambles. Acts 2006 (1st Ex. Sess.), No. 1, contained a preamble which read:

"WHEREAS, the Eighty-Fifth General Assembly finds that when military service personnel have been killed in action or have died as a result of their service to our country, their families should be afforded some protections to ensure that they are able to grieve their loss in privacy and peace; and

"WHEREAS, the Eighty-Fifth General Assembly finds that families of military service personnel and other families who have lost a loved one have a substantial interest in organizing and attending funerals, memorial services, wakes, visitations, and burials for deceased relatives with a deference to their privacy and peace; and

"WHEREAS, funerals, memorial services, wakes, visitations, and burials are intensely emotional times for the families of those who have died; and

"WHEREAS, the interests of families who are mourning the loss of deceased relatives are violated when military and other funerals, memorial services, wakes, visitations, or burials are targeted for picketing and other public demonstrations; and

"WHEREAS, the State of Arkansas has historically given deference to honoring those who have died and their grieving families and loved ones; and

"WHEREAS, the Eighty-Fifth General Assembly finds that it is imperative that grieving families, friends, and loved ones are given an adequate opportunity to mourn immediately before, during, and immediately after funerals, memorial services, wakes, visitations, and burials free from protesting and picketing; and

"WHEREAS, such a limited restriction strikes a balance between the exercise of freedom of speech and other constitutional rights while still affording families the right to mourn in peace,

"NOW THEREFORE, ..."

Effective Dates. Acts 2006 (1st Ex. Sess.), No. 1, § 2: Apr. 7, 2006. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that when military service personnel have been killed in action or have died as a result to their service to our country, their families should be afforded some protection to ensure that they are able to grieve their loss in privacy and peace; that families of military personnel and other families who have lost a loved one have a substantial interest in organizing and attending funerals, memorial services, wakes, visitations, and burials for deceased relatives with a deference to their privacy and peace; and that this act is immediately necessary because it is imperative that grieving families of military personnel and other families who have lost a loved one are given an adequate opportunity to mourn immediately before, during, and immediately after funerals, memorial services, wakes, visitations, and burials free from protesting and picketing and that such a limited restriction strikes a balance between the exercise of freedom of speech and other constitutional rights while still affording families the right to mourn in peace. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-71-202. Aggravated riot.

(a) A person commits the offense of aggravated riot if he or she commits the offense of riot when:

(1) The person knowingly possesses a deadly weapon; or

(2) The person knows that another person with whom he or she is acting possesses a deadly weapon.

(b) Aggravated riot is a Class D felony.

History. Acts 1975, No. 280, § 2903; A.S.A. 1947, § 41-2903; Acts 2007, No. 827, § 92.

5-71-207. Disorderly conduct.

(a) A person commits the offense of disorderly conduct if, with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk of public inconvenience, annoyance, or alarm, he or she:

(1) Engages in fighting or in violent, threatening, or tumultuous behavior;

(2) Makes unreasonable or excessive noise;

(3) In a public place, uses abusive or obscene language, or makes an obscene gesture, in a manner likely to provoke a violent or disorderly response;

(4) Disrupts or disturbs any lawful assembly or meeting of persons;

(5) Obstructs vehicular or pedestrian traffic;

(6) Congregates with two (2) or more other persons in a public place and refuses to comply with a lawful order to disperse of a law enforcement officer or other person engaged in enforcing or executing the law;

(7) Creates a hazardous or physically offensive condition;

(8) In a public place, mars, defiles, desecrates, or otherwise damages a patriotic or religious symbol that is an object of respect by the public or a substantial segment of the public; or

(9) In a public place, exposes his or her private parts.

(b) Disorderly conduct is a Class C misdemeanor.

History. Acts 1975, No. 280, § 2908; A.S.A. 1947, § 41-2908; Acts 2007, No. 827, § 93.

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes and Municipal Ordinances Proscribing Failure or Refusal to Obey Police Officer's Order to Move On, or Disperse, on Street, as Disorderly Conduct. 52 A.L.R.6th 125.

CASE NOTES

Evidence.

Evidence supported the inference that defendant juvenile intended to engage in the conduct of hitting a nurse and threatening her and a doctor's lives to create public inconvenience, annoyance, or alarm in violation of this section because the nurse testified that defendant attacked her on several different occasions, and defendant did not argue that he was in any way incapable of controlling his actions at the time he threatened to kill either the nurse or the doctor and struck the nurse; at the very least, defendant consciously disregarded the effects of his actions. M. T. v. State, 2009 Ark. App. 761, 350 S.W.3d 792 (2009).

There was sufficient evidence to uphold defendant's conviction for disorderly conduct in violation of subsection (a) of this section because after police offers arrived at defendant's house in response to a request from a utility company for a civil standby for a tree service to trim the trees

along electric lines, defendant became and remained irrational, even after being told that she could be arrested, she cursed police officers and tree service employees, and she aggressively ran from person to person confronting them, both inside and outside the designated work zone; there was testimony from the operations manager of the tree service that he was intimidated by defendant and was concerned for the well being of his employees, one of the officers also testified that she was intimidated by defendant, and the trial court, as the finder of fact, found the testimony of the state's witnesses to be more credible than the testimony of defendant and her husband. Watkins v. State, 2010 Ark. App. 85, 377 S.W.3d 286 (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 197 (Apr. 8, 2010), cert. denied, Watkins v. Arkansas, — U.S. —, 131 S. Ct. 275, 178 L. Ed. 2d 140 (2010).

Cited: Giron v. City of Alexander, 693 F. Supp. 2d 904 (E.D. Ark. 2010).

5-71-208. Harassment.

CASE NOTES

Cited: Lemmond v. State, 2012 Ark. App. 390, — S.W.3d — (2012).

5-71-212. Public intoxication — Drinking in public.

CASE NOTES

Cited: Giron v. City of Alexander, 693 F. Supp. 2d 904 (E.D. Ark. 2010).

5-71-213. Loitering.

CASE NOTES

Cited: Stufflebeam v. Harris, 521 F.3d 884 (8th Cir. 2008).

5-71-214. Obstructing a highway or other public passage.

(a) A person commits the offense of obstructing a highway or other public passage if, having no legal privilege to do so and acting alone or with another person, he or she renders any highway or other public passage impassable to pedestrian or vehicular traffic.

(b) It is a defense to a prosecution under this section that:

(1) The highway or other public passage was rendered impassable solely because of a gathering of persons to hear the defendant speak or otherwise communicate;

(2) The defendant was a member of a gathering contemplated by subdivision (b)(1) of this section; or

(3) The highway or public passage obstructed has not been established as a city street, county road, or state or federal highway under the laws of this state and no civil court has established a right of passage by prescription for the highway or public passage.

(c) Obstructing a highway or other public passage is a Class C misdemeanor.

History. Acts 1975, No. 280, § 2915; A.S.A. 1947, § 41-2915; Acts 1999, No. 1105, § 1.

Publisher's Notes. This section is being set out to reflect a correction to a reference in (b)(2).

5-71-215. Defacing objects of public respect.

(a) A person commits the offense of defacing objects of public respect if he or she purposely:

(1) Defaces, mars, or otherwise damages any public monument;

(2) Defaces, mars, or otherwise damages a work of art on display in any public place;

(3) Defaces, mars, desecrates, or otherwise damages any place of worship, cemetery, or burial monument; or

(4) Removes a broken or unbroken, commercial or rock, grave marker for any reason except for cleaning or repair by a family member, caretaker, or preservation organization.

(b)(1)(A) Except as provided in subdivision (b)(1)(B) of this section, defacing objects of public respect is a Class A misdemeanor if the value of repairing or replacing the damaged object does not exceed five hundred dollars ($500).

(B) Defacing objects of public respect is a Class D felony if the value of repairing or replacing the damaged object does not exceed five hundred dollars ($500) and if the object that is defaced, marred, desecrated, or otherwise damaged is a cemetery or burial monument.

(2)(A) Except as provided in subdivision (b)(2)(B) of this section, defacing objects of public respect is a Class D felony if the value of repairing or replacing the damaged object exceeds five hundred dollars ($500), but does not exceed two thousand five hundred dollars ($2,500).

(B) Defacing objects of public respect is a Class C felony if the value of repairing or replacing the damaged object exceeds five hundred dollars ($500) but does not exceed two thousand five hundred dollars ($2,500) and if the object that is defaced, marred, desecrated, or otherwise damaged is a cemetery or burial monument.

(3)(A) Except as provided in subdivision (b)(3)(B) of this section, defacing objects of public respect is a Class C felony if the value of repairing or replacing the damaged object exceeds two thousand five hundred dollars ($2,500).

(B) Defacing objects of public respect is a Class B felony if the value of repairing or replacing the damaged object exceeds two thousand five hundred dollars ($2,500) and if the object that is defaced, marred, desecrated, or otherwise damaged is a cemetery or burial monument.

History. Acts 1975, No. 280, § 2916; A.S.A. 1947, § 41-2916; Acts 1993, No. 169, § 1; 2005, No. 2232, § 4; 2007, No. 266, § 1.

5-71-216. [Repealed.]

Publisher's Notes. This section, concerning defacing public buildings, was repealed by Acts 2013, No. 1348, § 17. The section was derived from Acts 1975, No. 280, § 2917; A.S.A. 1947, § 41-2917.

5-71-217. Cyberbullying.

(a) As used in this section:

(1) "Communication" means the electronic communication of information of a person's choosing between or among points specified by the person without change in the form or content of the information as sent and received; and

(2) "Electronic means" means any textual, visual, written, or oral communication of any kind made through the use of a computer online service, Internet service, telephone, or any other means of electronic communication, including without limitation to a local bulletin board service, an Internet chat room, electronic mail, a social networking site, or an online messaging service.

(b) A person commits the offense of cyberbullying if:

(1) He or she transmits, sends, or posts a communication by electronic means with the purpose to frighten, coerce, intimidate, threaten, abuse, or harass, another person; and

(2) The transmission was in furtherance of severe, repeated, or hostile behavior toward the other person.

(c) The offense of cyberbullying may be prosecuted in the county where the defendant was located when he or she transmitted, sent, or posted a communication by electronic means, in the county where the communication by electronic means was received by the person, or in the county where the person targeted by the electronic communications resides.

(d)(1) Cyberbullying is a Class B misdemeanor.

(2)(A) Cyberbullying of a school employee is a Class A misdemeanor.

(B) As used in this subdivision (d)(2), "school employee" means a person who is employed full time or part time at a school that serves students in any of kindergarten through grade twelve (K-12), including without limitation a:

(i) Public school operated by a school district;

(ii) Public school operated by a state agency or institution of higher education;

(iii) Public charter school; or

(iv) Private school.

History. Acts 2011, No. 905, § 1; 2013, No. 1431, § 2; 2013, No. 1492, § 1.

A.C.R.C. Notes. Acts 2013, No. 1431, § 1, provided:

"The General Assembly finds that:

"(1) The successful recruitment and retention of school employees is essential to maintaining the state's constitutional obligation to provide a free and efficient system of public education;

"(2) A safe and civil environment in any school is necessary for school employees to meet the objective of providing opportunities for students to learn and achieve high academic standards;

"(3) Cyberbullying of school employees has become a national problem, subjecting school employees to many forms of intentional harassment that can be emotionally and professionally devastating;

"(4) Because of the nature of online communications, students may feel they can act with anonymity and detachment when they are engaging in cyberbullying of a school employee;

"(5) Some examples of the means used by students are:

"(A) Building a fake profile or website;

"(B) Posting or encouraging others to post on the Internet private, personal, or sexual information pertaining to a school employee;

"(C) Posting an original or edited image of the school employee on the Internet;

"(D) Accessing, altering, or erasing any computer network, computer data, computer program, or computer software, including breaking into a password-protected account or stealing or otherwise accessing passwords of a school employee;

"(E) Making repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a school employee;

"(F) Making, or causing to be made, and disseminating an unauthorized copy of data pertaining to a school employee in any form, including without limitation the printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network;

"(G) Signing up a school employee for a pornographic Internet site; or

"(H) Without authorization of the school employee, signing up a school employee for electronic mailing lists or to receive junk electronic messages and instant messages; and

"(6) This act is intended to heighten public attention to this crime and further protect an Arkansas public school employee from cyberbullying."

Amendments. The 2013 amendment by No. 1431 added (d)(2).

The 2013 amendment by No. 1492, in (b)(1), substituted "electronic" for "electonic" and "or harass" for "harass, or alarm."

5-71-229. Stalking.

(a)(1) A person commits stalking in the first degree if he or she knowingly engages in a course of conduct that would place a reasonable person in the victim's position under emotional distress and in fear for his or her safety or a third person's safety, and the actor:

(A) Does so in contravention of an order of protection consistent with the Domestic Abuse Act of 1991, § 9-15-101 et seq., or a no contact order as set out in subdivision (a)(2)(A) of this section, protecting the same victim, or any other order issued by any court protecting the same victim;

(B) Has been convicted within the previous ten (10) years of:

(i) Stalking in the second degree;

(ii) Terroristic threatening, § 5-13-301 or terroristic act, § 5-13-310; or

(iii) Stalking or threats against another person's safety under the statutory provisions of any other state jurisdiction; or

(C) Is armed with a deadly weapon or represents by word or conduct that he or she is armed with a deadly weapon.

(2)(A) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to

the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) The no contact order remains in effect during the pendency of any appeal of a conviction under this subsection (a) of this section.

(C) The judicial officer or prosecuting attorney shall provide a copy of the no contact order to the victim and the arresting law enforcement agency without unnecessary delay.

(D) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

(3) Stalking in the first degree is a Class C felony.

(b)(1) A person commits stalking in the second degree if he or she knowingly engages in a course of conduct that harasses another person and makes a terroristic threat with the purpose of placing that person in imminent fear of death or serious bodily injury or placing that person in imminent fear of the death or serious bodily injury of his or her immediate family.

(2)(A) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) The no contact order remains in effect during the pendency of any appeal of a conviction under this subsection (b).

(C) The judicial officer or prosecuting attorney shall provide a copy of the no contact order to the victim and arresting law enforcement agency without unnecessary delay.

(D) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter such orders as are consistent with § 5-2-305.

(3) Stalking in the second degree is a Class D felony.

(c)(1) A person commits stalking in the third degree if he or she knowingly commits an act that would place a reasonable person in the victim's position under emotional distress and in fear for his or her safety or a third person's safety.

(2)(A) Upon pretrial release of the defendant, a judicial officer shall enter a no contact order in writing consistent with Rules 9.3 and 9.4 of the Arkansas Rules of Criminal Procedure and shall give notice to the defendant of penalties contained in Rule 9.5 of the Arkansas Rules of Criminal Procedure.

(B) The no contact order remains in effect during the pendency of any appeal of a conviction under this subsection (c).

(C) The judicial officer or prosecuting attorney shall provide a copy of the no contact order to the victim and arresting law enforcement agency without unnecessary delay.

(D) If the judicial officer has reason to believe that mental disease or defect of the defendant will or has become an issue in the cause, the judicial officer shall enter orders as are consistent with § 5-2-305.

(3) Stalking in the third degree is a Class A misdemeanor.

(d) It is an affirmative defense to prosecution under this section if the actor is a law enforcement officer, licensed private investigator, attorney, process server, licensed bail bondsman, or a store detective acting within the reasonable scope of his or her duty while conducting surveillance on an official work assignment.

(e) It is not a defense to a prosecution under this section that the actor was not given actual notice by the victim that the actor's conduct was not wanted.

(f) As used in this section:

(1)(A) "Course of conduct" means a pattern of conduct composed of two (2) or more acts, separated by at least thirty-six (36) hours, but occurring within one (1) year, including without limitation an act in which the actor directly, indirectly, or through a third party by any action, method, device, or means follows, monitors, observes, places under surveillance, threatens, or communicates to or about a person or interferes with a person's property.

(B)(i) "Course of conduct" does not include constitutionally protected activity.

(ii) If the defendant claims that he or she was engaged in a constitutionally protected activity, the court shall determine the validity of that claim as a matter of law and, if found valid, shall exclude that activity from evidence;

(2)(A) "Emotional distress" means significant mental suffering or distress.

(B) "Emotional distress" does not require that the victim sought or received medical or other professional treatment or counseling; and

(3) "Harasses" means an act of harassment as prohibited by § 5-71-208.

History. Acts 1993, No. 379, §§ 1-3; 1993, No. 388, §§ 1-3; 1995, No. 1302, § 1; 2007, No. 827, § 94; 2013, No. 1014, § 1.

A.C.R.C. Notes. Acts 2013, No. 1014, § 1, amended subdivision (a)(3) of this section to read "Stalking in the first degree is a Class B C felony." The apparent legislative intent was to make stalking in the first degree a Class C felony.

Amendments. The 2013 amendment rewrote the introductory language in (a)(1); rewrote (a)(1)(b)(iii); substituted "Class C" for "Class B" in (a)(3); substituted "Class D" for "Class C" in (b)(3); added (c) and (e), redesignating subsections accordingly; in (f), added the language beginning "including without" to the end of (1)(A), inserted (2), and, in current (3), deleted the definition for "Immediate family" and added the definition for "Harasses."

CASE NOTES

Evidence.

Three threats defendant made against the victim and her family constituted sufficient evidence of a terroristic threat; thus, defendant's conviction for first-degree stalking was affirmed. Lowry v. State, 364 Ark. 6, 216 S.W.3d 101 (2005).

5-71-230. Violation of the protection of peace for mourning at a funeral.

(a) As used in this section:

(1)(A) "Funeral" means a ceremony or memorial service held in connection with the burial or cremation of a person who has died in which the family of the deceased has a personal stake in memorializing and honoring the deceased and the desire to be able to mourn in peace during the ceremony or memorial service.

(B) "Funeral" does not include a procession related to the funeral; and

(2) "Picket" means to engage in the activity of protesting or demonstrating to target a funeral without authorization from the family of the deceased.

(b) A person commits the offense of violation of the protection of peace for mourning at a funeral if the person:

(1) Knowingly pickets a funeral;

(2) Has a purpose to interfere with the funeral; and

(3) Pickets:

(A) Within three hundred feet (300') of any ingress or egress of the funeral; and

(B) Either:

(i) During the funeral;

(ii) Within thirty (30) minutes immediately before the scheduled commencement of the funeral; or

(iii) Within thirty (30) minutes immediately following the completion of the funeral.

(c)(1) Violation of the protection of the peace for mourning at a funeral is a Class C misdemeanor.

(2) A person commits a separate offense for each funeral that the person pickets in violation of this section.

History. Acts 2006 (1st Ex. Sess.), No. 1, § 1; 2011, No. 142, § 1; 2013, No. 1125, § 17.

Amendments. The 2011 amendment added "in which the family of the deceased ... ceremony or memorial service" at the end of (a)(1)(A); added "without authorization from the family of the deceased" at the end of (a)(2); and substituted "three hundred feet (300') of any ingress or egress" for "one hundred fifty feet (150')" in (b)(3)(A).

The 2013 amendment substituted "Has a purpose" for "Intends" in (b)(2).

RESEARCH REFERENCES

ALR. Actions by or Against Individuals or Groups Protesting or Picketing at Funerals. 40 A.L.R.6th 375.

CHAPTER 72

WATER AND WATERCOURSES

SECTION.

5-72-105. Obstruction of drains by timber or material — Floating logs or boom.

(a)(1) It is unlawful for any person or corporation to cause any timber, tree, or material to be felled or thrown into any ditch, drain, stream, or canal, whether natural or artificial, that tends to obstruct the free flow of water in the ditch, drain, stream, or canal.

(2) However, this subsection does not prevent any person from floating a log or having a boom in any natural stream in this state if the floating of the log or use of the boom does not tend to overflow the land adjacent to the boom.

(b)(1) Any person, levee district, or drainage district interested in the maintenance of the free flow of water through any stream, drain, ditch, or canal, may remove any timber, tree, or material in the stream, ditch, drain, or canal that tends to obstruct the free flow of water.

(2) The person, levee district, or drainage district has a cause of action against any person or corporation that may have felled or thrown, or caused to be felled or thrown timber, a tree, or material into a stream, drain, ditch, or canal, for the reasonable cost of removing the timber, tree, or material.

(c) Any person or corporation that violates subsection (a) of this section is guilty of a violation and upon conviction shall be fined in any sum not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000).

History. Acts 1905, No. 320, §§ 1-3, p. 764; C. & M. Dig., §§ 3662-3664; Pope's Dig., §§ 4513-4515; A.S.A. 1947, §§ 21-406 — 21-408; Acts 2005, No. 1994, § 469; 2007, No. 827, § 95.

CHAPTER 73

WEAPONS

SUBCHAPTER.

Subchapter 1 — Possession and Use Generally

Effective Dates. Acts 2006 (1st Ex. Sess.), No. 14, § 2: Apr. 10, 2006. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that many companies in the state have contracts with the Bureau of Alcohol, Tobacco, Firearms, and Explosives of the United States Department of Justice or the United States Department of Defense; that numerous employees of the companies have been or will be terminated from their positions because they cannot be granted relief from federal explosives disabilities under current Arkansas law; and that this act is immediately necessary in order to preserve jobs for the citizens of the State of Arkansas. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2013, No. 539, § 5: Mar. 28, 2013. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that a prosecuting attorney and his or her deputy prosecuting attorneys perform a vital public function and often are in dangerous situations due to the nature of the crimes they prosecute; and that this act is immediately necessary because allowing a prosecuting attorney and his or her deputy prosecuting attorneys to carry a firearm or concealed handgun is essential to the safe operation of criminal justice in this state. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-73-101. Definitions.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

5-73-102. Possessing instrument of crime.

RESEARCH REFERENCES

ALR. Construction and Application of United States Supreme Court Holdings in *District of Columbia v. Heller,* 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 2008 U.S. LEXIS 5268 (2008) and *McDonald v. City of Chicago, Ill.,* 130 S. Ct. 3020, 177 L. Ed. 2d 894, 2010 U.S. LEXIS 5523 (2010) Respecting Second Amendment Right to Keep and Bear Arms, to State or Local Laws Regulating Firearms or Other Weapons. 64 A.L.R.6th 131.

5-73-103. Possession of firearms by certain persons.

(a) Except as provided in subsection (d) of this section or unless authorized by and subject to such conditions as prescribed by the Governor, or his or her designee, or the Bureau of Alcohol, Tobacco, Firearms and Explosives of the United States Department of Justice, or other bureau or office designated by the United States Department of Justice, no person shall possess or own any firearm who has been:

(1) Convicted of a felony;

(2) Adjudicated mentally ill; or

(3) Committed involuntarily to any mental institution.

(b)(1) Except as provided in subdivisions (b)(2) and (3) of this section, a determination by a jury or a court that a person committed a felony constitutes a conviction for purposes of subsection (a) of this section even though the court suspended imposition of sentence or placed the defendant on probation.

(2) Subdivision (b)(1) of this section does not apply to a person whose case was dismissed and expunged under § 16-93-301 et seq. or § 16-98-303(g).

(3) The determination by the jury or court that the person committed a felony does not constitute a conviction for purposes of subsection (a) of this section if the person is subsequently granted a pardon explicitly restoring the ability to possess a firearm.

(c)(1) A person who violates this section commits a Class B felony if:

(A) The person has a prior violent felony conviction;

(B) The person's current possession of a firearm involves the commission of another crime; or

(C) The person has been previously convicted under this section or a similar provision from another jurisdiction.

(2) A person who violates this section commits a Class D felony if he or she has been previously convicted of a felony and his or her present conduct or the prior felony conviction does not fall within subdivision (c)(1) of this section.

(3) Otherwise, the person commits a Class A misdemeanor.

(d) The Governor may restore without granting a pardon the right of a convicted felon or an adjudicated delinquent to own and possess a firearm upon the recommendation of the chief law enforcement officer in the jurisdiction in which the person resides, so long as the underlying felony or delinquency adjudication:

(1) Did not involve the use of a weapon; and

(2) Occurred more than eight (8) years ago.

History. Acts 1975, No. 280, § 3103; 1977, No. 360, § 18; A.S.A. 1947, § 41-3103; Acts 1987, No. 74, § 1; 1994 (2nd Ex. Sess.), No. 63, § 1; 1995, No. 595, § 1; 1995, No. 1325, § 1; 2001, No. 1429, § 1; 2009, No. 1491, § 1.

Amendments. The 2009 amendment inserted "Except as provided in subdivisions (b)(2) and (3) of this section" in (b)(1), inserted (b)(2), redesignated the subsequent subdivision accordingly, and made related and minor stylistic changes.

RESEARCH REFERENCES

ALR. Construction and Application of United States Supreme Court Holdings in *District of Columbia v. Heller,* 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 2008 U.S. LEXIS 5268 (2008) and *McDonald v. City of Chicago, Ill.,* 130 S. Ct. 3020, 177 L. Ed. 2d 894, 2010 U.S. LEXIS 5523 (2010) Respecting Second Amendment Right to Keep and Bear Arms, to State or Local Laws Regulating Firearms or Other Weapons. 64 A.L.R.6th 131.

U. Ark. Little Rock. L. Rev. Annual Survey of Case Law, Criminal Law, 28 U. Ark. Little Rock L. Rev. 677.

CASE NOTES

Analysis

Constitutionality.
Constructive Possession.
Conviction.
Evidence.
Expungement of Prior Felony.
Sentencing.

Constitutionality.

Apprendi v. New Jersey, 120 S. Ct. 2348, 530 U.S. 466, 147 L. Ed. 2d 435 (2000), does not compel the reversal of Ferguson v. State, 362 Ark. 547, 210 S.W.3d 53 (2003), because whether a prior felony was violent in nature is a matter of law for the trial court; moreover, the jury did not have to determine the fact of a prior conviction. Austin v. State, 98 Ark. App. 380, 255 S.W.3d 888 (2007).

Constructive Possession.

Conviction for being a felon in possession of a firearm was reversed as, although defendant was a felon, the state failed to show constructive possession; despite the fact that a gun was found in a jointly occupied apartment, nothing showed that defendant had care, control, and management over the contraband. Williams v. State, 95 Ark. App. 307, 236 S.W.3d 519 (2006).

Evidence showed that defendant signed the ticket to pawn a gun, which constituted circumstantial evidence that defendant constructively possessed the firearm; the pawn ticket indicated that defendant had given a security interest in the gun, and the pawn shop owner's testimony made it clear that only defendant could have redeemed the pawn ticket and retrieved the gun. Loar v. State, 368 Ark. 171, 243 S.W.3d 923 (2006).

Conviction.

Several convictions, including one for being a violent felon in possession of a firearm under § 5-73-103(c), were reversed because a trial court erred by refusing to accept defendant's stipulation to having a prior felony; it should not have informed the jury that the prior conviction was violent and allowed publication to the jury. Austin v. State, 98 Ark. App. 380, 255 S.W.3d 888 (2007).

Evidence.

Defendant's convictions for first-degree murder, a terroristic act, and possession of firearms by certain persons were proper where the jury believed the witnesses's testimony that defendant fired the only shots and fired toward the group where the victim was standing and toward the nightclub. Jackson v. State, 363 Ark. 311, 214 S.W.3d 232 (2005).

Defendant's conviction for being a felon in possession of a firearm was inappropriate because the state failed to introduce evidence that defendant had a prior felony conviction. Epps v. State, 100 Ark. App. 344, 268 S.W.3d 362 (2007).

Sufficient evidence supported the conclusion that a defendant was in possession of a gun and that defendant was a convicted felon: a witness testified that the witness gave defendant a gun, other witnesses testified that defendant shot a victim with that gun, and the record showed that defendant had been convicted of three prior felonies. Hawkins v. State, 2009 Ark. App. 675, — S.W.3d — (2009).

In a case in which defendant was found guilty on three counts of attempted first-degree murder, of being a felon in possession of a firearm, and three counts of committing a terroristic act, he unsuccessfully argued that substantial evidence did not support his convictions; while the evidence was circumstantial, substantial evidence supported the conclusion that defendant committed the crimes in question. Moments after the shooting, a dark-colored car was observed speeding away from the area without its lights on even though it was dark outside, that car crashed into another vehicle five blocks from the shooting, a witness positively identified defendant as the person who emerged from the driver's side of the car carrying a long rifle, shell casings from a rifle were recovered from the scene of the shooting, defendant's DNA was found on the driver's side airbag of the car, and the car contained a letter addressed to defendant. Smith v. State, 2010 Ark. App. 216, — S.W.3d — (2010).

When a rape victim testified at defendant's probation revocation hearing that he had a gun at the time of the rape, that testimony was sufficient for the court to find that he had possessed a firearm within the meaning of subdivision (a)(1) of this section and § 5-1-102(15). Craig v. State, 2010 Ark. App. 309, — S.W.3d — (2010).

Evidence was sufficient to support defendant's conviction for possession of a firearm by certain persons, in violation of subsection (a) of this section, as a firearm was observed in plain view next to defendant in a truck that he was riding in; the evidence showed that defendant was in constructive possession, if not actual possession, of the weapon. Hancock v. State, 2012 Ark. App. 338, — S.W.3d — (2012).

Defendant's conviction for possession of a firearm by a convicted felon under subsection (a) of this section was sufficiently supported by evidence from a friend that he had seen defendant shoot the rifle although the rifle belonged to defendant's father and it was at his friend's house for shooting a raccoon. Fraser v. State, 2012 Ark. App. 598, — S.W.3d —, 2012 Ark. App. LEXIS 699 (Oct. 24, 2012).

Defendant's conviction for possession of a firearm by a felon, in violation of subdivision (a)(1) of this section, was supported by the evidence because defendant lived alone in a cabin for a week in which there was a gun in plain sight right in front of the door; although defendant denied being aware of the gun, the jury was not required to believe defendant's testimony. Magness v. State, 2012 Ark. App. 609, — S.W.3d —, 2012 Ark. App. LEXIS 721 (Oct. 31, 2012).

Expungement of Prior Felony.

Trial court did not err by admitting defendant's prior conviction for felony possession of drug paraphernalia into evidence as proof on a charge of possession of a firearm by a felon (FIP) because subdivision (a)(1) of this section specifically provided that defendant's expunged felony conviction could be used as proof on his FIP charge; although still uncodified, 1995 Ark. Acts. 595, § 1 indicates legislative intent for an expunged felony conviction to remain a conviction for the purposes of possession of a firearm by a felon. Smith v. State, 2011 Ark. App. 539, — S.W.3d — (2011).

Sentencing.

State v. Lawson, 295 Ark. 37, 746 S.W.2d 544, 1988 Ark. LEXIS 84 (1988), prohibits "stacking" of specific subsequent-offense penalty enhancements like the one in the driving while impaired

statute, which operates to convert a misdemeanor to a felony because of multiple recurrences of the same underlying offense within a specified period of time; the Court of Appeals of Arkansas, Division One, declines to expand Lawson past that boundary. Therefore, there was no impermissible stacking of a specific firearm enhancement statute for a felon in possession of a firearm under subdivision (c)(1) of this section with the general habitual-offender enhancement statute under § 5-4-401(b)(2)(C); subdivision (c)(1) did not contain an enhancement for recidivism, there was no greater sentence than if either statute was applied singly, and the designation of the possession offense as a Class B felony was not an enhancement. Moore v. State, 2012 Ark. App. 662, — S.W.3d —, 2012 Ark. App. LEXIS 764 (Nov. 14, 2012).

Cited: Butler v. State, 2011 Ark. App. 708, — S.W.3d — (2011).

5-73-104. Criminal use of prohibited weapons.

(a) A person commits the offense of criminal use of prohibited weapons if, except as authorized by law, he or she uses, possesses, makes, repairs, sells, or otherwise deals in any:

(1) Bomb;

(2) Machine gun;

(3) Sawed-off shotgun or rifle;

(4) Firearm specially made or specially adapted for silent discharge;

(5) Metal knuckles; or

(6) Other implement for the infliction of serious physical injury or death.

(b) It is a defense to prosecution under this section that:

(1) The defendant was a law enforcement officer, prosecuting attorney, deputy prosecuting attorney, prison guard, or member of the armed forces acting in the course and scope of his or her duty at the time he or she used or possessed the prohibited weapon; or

(2) The defendant used, possessed, made, repaired, sold, or otherwise dealt in any article enumerated in subsection (a) of this section under circumstances negating any likelihood that the weapon could be used as a weapon.

(c)(1) Criminal use of prohibited weapons is a Class B felony if the weapon is a bomb, machine gun, or firearm specially made or specially adapted for silent discharge.

(2) Criminal use of prohibited weapons is a Class A misdemeanor if the offense is possession of metal knuckles.

(3) Otherwise, criminal use of prohibited weapons is a Class D felony.

History. Acts 1975, No. 280, § 3104; A.S.A. 1947, § 41-3104; Acts 1993, No. 1189, § 7; 2005, No. 1994, § 438; 2011, No. 161, § 1; 2013, No. 539, § 1.

Amendments. The 2011 amendment inserted (c)(2) and redesignated former (c)(2) as (c)(3).

The 2013 amendment inserted "prosecuting attorney, deputy prosecuting attorney" in (b)(1).

CASE NOTES

Analysis

Construction.
Sawed-off Shotgun.

Construction.

District court misapplied the categorical approach to determining whether defendant's prior adjudication of juvenile delinquency involved a "violent felony" within the meaning of 18 U.S.C.S. § 924(e)(2)(B)(ii). Defendant was adjudicated a delinquent for violating this section, but it could not be determined from the record whether defendant violated this section by possessing a sawed-off rifle or some "other implement" such as a knife; while possession of a sawed-off rifle was a violent felony, it did not necessarily follow that possession of every weapon prohibited by this section would qualify. United States v. King, 598 F.3d 1043 (8th Cir. 2010).

Sawed-off Shotgun.

Possession of a sawed-off shotgun was similar, in kind as well as degree of risk posed, to the offenses listed in 18 U.S.C.S. § 924(e); thus, the district court did not err by finding that defendant's 1994 conviction for possession of a sawed-off shotgun was an Armed Career Criminal Act-qualifying felony. United States v. Vincent, 575 F.3d 820 (8th Cir. 2009).

5-73-108. Criminal acts involving explosives.

(a)(1) A person commits the offense of criminal possession of explosive material or a destructive device if the person:

(A) Sells, possesses, manufactures, transfers, or transports explosive material or a destructive device; and

(B) Either:

(i) Has the purpose of using that explosive material or destructive device to commit an offense; or

(ii) Knows or should know that another person intends to use that explosive material or destructive device to commit an offense.

(2) Criminal possession of explosive material or a destructive device is a Class B felony.

(b)(1) A person commits the offense of criminal distribution of explosive material if he or she knowingly distributes explosive material to any individual who:

(A) Has pleaded guilty or nolo contendere to or been found guilty of a crime in state or federal court punishable by imprisonment for a term exceeding one (1) year;

(B) Is a fugitive from justice;

(C) Is an unlawful user of or addicted to any controlled substance;

(D) Has been adjudicated as having a mental disease or defect or has been committed to an institution or residential treatment facility because of a mental disease or defect;

(E) Is under twenty-one (21) years of age;

(F) Is an alien, other than an alien who is:

(i) Lawfully admitted for permanent residence as defined in 8 U.S.C. § 1101(a)(20), as it existed on January 1, 2009;

(ii) In lawful nonimmigrant status, a refugee admitted under 8 U.S.C. § 1157, as it existed on January 1, 2009, or in asylum status under 8 U.S.C. § 1158, as it existed on January 1, 2009, and either:

(a) A foreign law enforcement officer of a friendly foreign government, as determined by the Secretary of State under 18 U.S.C. § 842, entering the United States on official law enforcement business, and the distribution of explosive material is in furtherance of this official law enforcement business; or

(b) A person having the power to direct or cause the direction of the management and policies of a corporation, partnership, or association licensed under 18 U.S.C. § 843, as it existed on January 1, 2009, and the distribution of explosive material is in furtherance of the person's power;

(iii) A member of a North Atlantic Treaty Organization or other friendly foreign military force, as determined by the Attorney General of the United States in consultation with the Secretary of Defense under 18 U.S.C. § 842, who is present in the United States under military orders for training or other military purpose authorized by the United States and distribution of explosive material is in furtherance of the military orders for training or authorized military purpose; or

(iv) Lawfully present in the United States in cooperation with the Director of the Central Intelligence Agency, and the distribution of explosive material is in furtherance of the cooperation;

(G) Has been dishonorably discharged from any branch of the United States armed forces; or

(H) Has renounced his or her United States citizenship.

(2) Criminal distribution of explosive material is a Class C felony.

(c)(1) A person commits the offense of possession of stolen explosive material if he or she:

(A) Receives, possesses, transports, ships, conceals, stores, barters, sells, disposes of, or pledges or accepts as security for a loan any stolen explosive materials; and

(B) Knows or has reasonable cause to believe that the explosive material was stolen.

(2) Possession of stolen explosive material is a Class C felony.

(d)(1) A person commits the offense of unlawful receipt or possession of an explosive material if the person receives or possesses explosive material and:

(A) Has pleaded guilty or nolo contendere to or has been found guilty in any state or federal court of a crime punishable by imprisonment for a term exceeding one (1) year;

(B) Is a fugitive from justice;

(C) Is an unlawful user of or addicted to any controlled substance;

(D) Has been adjudicated to have a mental disease or defect or has been committed to an institution or residential treatment facility because of a mental disease or defect;

(E) Is under twenty-one (21) years of age;

(F) Is an alien, other than an alien who is:

(i) Lawfully admitted for permanent residence as defined in 8 U.S.C. § 1101(a)(20), as it existed on January 1, 2009; or

(ii) In lawful nonimmigrant status, a refugee admitted under 8 U.S.C. § 1157, as it existed on January 1, 2009, or in asylum status under 8 U.S.C. § 1158, as it existed on January 1, 2009, and either:

(a) A foreign law enforcement officer of a friendly foreign government, as determined by the Secretary of State under 18 U.S.C. § 842, entering the United States on official law enforcement business, and the receipt or possession of the explosive material is in furtherance of this official law enforcement business; or

(b) A person having the power to direct or cause the direction of the management and policies of a corporation, partnership, or association licensed under 18 U.S.C. § 843, as it existed on January 1, 2009, and the receipt or possession of the explosive material is in furtherance of the person's power;

(iii) A member of a North Atlantic Treaty Organization or other friendly foreign military force, as determined by the Attorney General of the United States in consultation with the Secretary of Defense under 18 U.S.C. § 842, who is present in the United States under military orders for training or other military purpose authorized by the United States, and the receipt or possession of the explosive material is in furtherance of the military orders for training or authorized military purpose; or

(iv) Lawfully present in the United States in cooperation with the Director of the Central Intelligence Agency, and the receipt or possession of the explosive material is in furtherance of the cooperation;

(G) Has been dishonorably discharged from any branch of the United States armed forces; or

(H) Has renounced his or her United States citizenship.

(2) Unlawful receipt or possession of explosive material is a Class C felony.

(3) It is a defense to prosecution under this subsection if at the time of the receiving or possessing the explosive material the person was acting within the scope of his or her employment with a business authorized to use explosive material.

(e) It is a Class A misdemeanor for any person to store any explosive material in a manner not in conformity with the Arkansas Fire Prevention Code.

(f) A person who commits theft of any explosive material with the purpose to cause harm to a person or property is guilty of a Class B felony.

(g) Any explosive material determined to be contraband is subject to seizure by a law enforcement officer and to being destroyed in conformity with the Arkansas Fire Prevention Code.

(h) As used in this section, "alien" means a person who is not a citizen or national of the United States.

History. Acts 1975, No. 280, § 3108; A.S.A. 1947, § 41-3108; Acts 2005, No. 1226, § 2; 2006 (1st Ex. Sess.), No. 14, § 1; 2009, No. 339, § 1; 2011, No. 1120, § 14.

Amendments. The 2006 (1st Ex. Sess.) amendment deleted former (d) and redesignated the remaining subsections accordingly.

The 2009 amendment rewrote (b)(1); inserted (d) and redesignated the subsequent subsections accordingly; added (h); and made a minor stylistic change.

The 2011 amendment inserted "who is" in (h).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

5-73-109. Furnishing a deadly weapon to a minor.

(a) A person commits the offense of furnishing a deadly weapon to a minor if he or she sells, barters, leases, gives, rents, or otherwise furnishes a firearm or other deadly weapon to a minor without the consent of a parent, guardian, or other person responsible for general supervision of the minor's welfare.

(b)(1) Furnishing a deadly weapon to a minor is a Class A misdemeanor.

(2) However, furnishing a deadly weapon to a minor is a Class B felony if the deadly weapon is:

(A) A handgun;

(B) A sawed-off or short-barrelled shotgun, as defined in § 5-1-102;

(C) A sawed-off or short-barrelled rifle, as defined in § 5-1-102;

(D) A firearm that has been specially made or specially adapted for silent discharge;

(E) A machine gun;

(F) An explosive or incendiary device, as defined in § 5-71-301;

(G) Metal knuckles;

(H) A defaced firearm, as defined in § 5-73-107; or

(I) Another implement for the infliction of serious physical injury or death that serves no common lawful purpose.

History. Acts 1975, No. 280, § 3109; A.S.A., 1947, § 41-3109; Acts 1994 (2nd Ex. Sess.), No. 45, § 1.

Publisher's Notes. This section is being set out to reflect a correction to a gender reference in (a).

This Cross reference note is being set out to correct a reference.

Cross References. Contributing to delinquency of a minor, § 5-27-209.

5-73-111. Unlawful procurement of a firearm.

(a) As used in this section:

(1) "Ammunition" means any cartridge, shell, or projectile designed for use in a firearm;

(2) "False information" means information that portrays an unlawful transaction as lawful or a lawful transaction as unlawful;

(3) "Licensed dealer" means a person who is licensed under 18 U.S.C. § 923, as it existed on January 1, 2013, to engage in the business of dealing in firearms; and

(4) "Private seller" means a person other than a licensed dealer who sells or offers for sale a firearm or ammunition.

(b) A person commits the offense of unlawful procurement of a firearm or ammunition if he or she knowingly:

(1) Solicits, persuades, encourages, or entices a licensed dealer or private seller to transfer a firearm or ammunition under unlawful circumstances; or

(2) Provides false information to a licensed dealer or private seller with a purpose to deceive the licensed dealer or private seller concerning the lawfulness of a transfer of a firearm or ammunition.

(c) It is a defense to prosecution under this section if the person is:

(1) A law enforcement officer acting in his or her official capacity; or

(2) Acting at the direction of a law enforcement officer.

(d) Unlawful procurement of a firearm or ammunition is a Class D felony.

History. Acts 2013, No. 507, § 1.

5-73-119. Handguns — Possession by minor or possession on school property.

(a)(1) No person in this state under eighteen (18) years of age shall possess a handgun.

(2)(A) A violation of subdivision (a)(1) of this section is a Class A misdemeanor.

(B) A violation of subdivision (a)(1) of this section is a Class D felony if the person has previously:

(i) Been adjudicated delinquent for a violation of subdivision (a)(1) of this section;

(ii) Been adjudicated delinquent for any offense that would be a felony if committed by an adult; or

(iii) Pleaded guilty or nolo contendere to or been found guilty of a felony in circuit court while under eighteen (18) years of age.

(b)(1) No person in this state shall possess a firearm:

(A) Upon the developed property of a public or private school, K-12;

(B) In or upon any school bus; or

(C) At a designated bus stop as identified on the route list published by a school district each year.

(2)(A) A violation of subdivision (b)(1) of this section is a Class D felony.

(B) No sentence imposed for a violation of subdivision (b)(1) of this section shall be suspended or probated or treated as a first offense under § 16-93-301 et seq.

(c)(1) Except as provided in § 5-73-322, a person in this state shall not possess a handgun upon the property of any private institution of

higher education or a publicly supported institution of higher education in this state on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to employ the handgun as a weapon against a person.

(2) A violation of subdivision (c)(1) of this section is a Class D felony.

(d) "Handgun" means a firearm capable of firing rimfire ammunition or centerfire ammunition and designed or constructed to be fired with one (1) hand.

(e) It is permissible to carry a handgun under this section if at the time of the act of possessing a handgun or firearm:

(1) The person is in his or her own dwelling or place of business or on property in which he or she has a possessory or proprietary interest, except upon the property of a public or private institution of higher learning;

(2) The person is a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties;

(3) The person is assisting a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties pursuant to the direction or request of the law enforcement officer, correctional officer, or member of the armed forces;

(4) The person is a registered commissioned security guard acting in the course and scope of his or her duties;

(5) The person is hunting game with a handgun or firearm that may be hunted with a handgun or firearm under the rules and regulations of the Arkansas State Game and Fish Commission or is en route to or from a hunting area for the purpose of hunting game with a handgun or firearm;

(6) The person is a certified law enforcement officer;

(7) The person is on a journey beyond the county in which the person lives, unless the person is eighteen (18) years of age or less;

(8) The person is participating in a certified hunting safety course sponsored by the commission or a firearm safety course recognized and approved by the commission or by a state or national nonprofit organization qualified and experienced in firearm safety;

(9) The person is participating in a school-approved educational course or sporting activity involving the use of firearms;

(10) The person is a minor engaged in lawful marksmanship competition or practice or other lawful recreational shooting under the supervision of his or her parent, legal guardian, or other person twenty-one (21) years of age or older standing in loco parentis or is traveling to or from a lawful marksmanship competition or practice or other lawful recreational shooting with an unloaded handgun or firearm accompanied by his or her parent, legal guardian, or other person twenty-one (21) years of age or older standing in loco parentis; or

(11) The person has a license to carry a concealed handgun under § 5-73-301 et seq. and is carrying a concealed handgun on the devel-

oped property of a kindergarten through grade twelve (K-12) private school operated by a church or other place of worship that:

(A) Is located on the developed property of the kindergarten through grade twelve (K-12) private school;

(B) Allows the person to carry a concealed handgun into the church or other place of worship under § 5-73-306; and

(C) Allows the person to possess a concealed handgun on the developed property of the kindergarten through grade twelve (K-12) private school.

History. Acts 1989, No. 649, §§ 1-4; 1993, No. 1166, § 1; 1993, No. 1189, § 4; 1994 (2nd Ex. Sess.), No. 57, § 1; 1994 (2nd Ex. Sess.), No. 58, § 1; 1999, No. 1282, § 1; 2001, No. 592, § 1; 2005, No. 1994, § 476; 2013, No. 226, § 1; 2013, No. 746, § 1; 2013, No. 1390, § 1.

Amendments. The 2013 amendment by No. 226 added "Except as provided in § 5-73-322" at the beginning of (c)(1).

The 2013 amendment by No. 746 substituted "It is permissible to carry a handgun under this section if" for "It is a defense to prosecution under this section that" in the introductory language of (e); substituted "registered commissioned security guard" for "licensed security guard" in (e)(4); inserted "beyond the county in which the person lives" in (e)(7); and substituted "a lawful marksmanship competition or practice or other lawful recreational shooting" for "this activity" in (e)(10).

The 2013 amendment by No. 1390 added (e)(11).

5-73-120. Carrying a weapon.

(a) A person commits the offense of carrying a weapon if he or she possesses a handgun, knife, or club on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to attempt to unlawfully employ the handgun, knife, or club as a weapon against a person.

(b) As used in this section:

(1) "Club" means any instrument that is specially designed, made, or adapted for the purpose of inflicting serious physical injury or death by striking, including a blackjack, billie, and sap;

(2) "Handgun" means any firearm with a barrel length of less than twelve inches (12″) that is designed, made, or adapted to be fired with one (1) hand;

(3) "Journey" means travel beyond the county in which a person lives; and

(4) "Knife" means any bladed hand instrument three inches (3″) or longer that is capable of inflicting serious physical injury or death by cutting or stabbing, including a dirk, a sword or spear in a cane, a razor, an ice pick, a throwing star, a switchblade, and a butterfly knife.

(c) It is permissible to carry a handgun under this section if at the time of the act of carrying a weapon:

(1) The person is in his or her own dwelling or place of business or on property in which he or she has a possessory or proprietary interest;

(2) The person is a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties;

(3) The person is assisting a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties pursuant to the direction or request of the law enforcement officer, correctional officer, or member of the armed forces;

(4) The person is carrying a weapon when upon a journey, unless the journey is through a commercial airport when presenting at the security checkpoint in the airport or is in the person's checked baggage and is not a lawfully declared weapon;

(5) The person is a registered commissioned security guard acting in the course and scope of his or her duties;

(6) The person is hunting game with a handgun that may be hunted with a handgun under rules and regulations of the Arkansas State Game and Fish Commission or is en route to or from a hunting area for the purpose of hunting game with a handgun;

(7) The person is a certified law enforcement officer;

(8) The person is in possession of a concealed handgun and has a valid license to carry a concealed handgun under § 5-73-301 et seq., or recognized under § 5-73-321 and is not in a prohibited place as defined by § 5-73-306;

(9) The person is a prosecuting attorney or deputy prosecuting attorney carrying a firearm under § 16-21-147; or

(10) The person is in possession of a handgun and is a retired law enforcement officer with a valid concealed carry authorization issued under federal or state law.

(d) Carrying a weapon is a Class A misdemeanor.

History. Acts 1975, No. 696, § 1; 1981, No. 813, § 1; A.S.A. 1947, § 41-3151; Acts 1987, No. 266, § 1; 1987, No. 556, § 1; 1987, No. 734, § 1; 1995, No. 832, § 1; 2003, No. 1267, § 2; 2005, No. 1994, § 293; 2013; No. 539, § 2; 2013, No. 746, § 2.

Amendments. The 2013 amendment by No. 539 added (c)(9).

The 2013 amendment by No. 746 substituted "to attempt to unlawfully employ" for "to employ" in (a); inserted (b)(3); redesignated former (b)(3)(A) and (3)(B) as (b)(4) and inserted "three inches (3″) or longer"; substituted "It is permissible to carry a handgun under this section if" for "It is a defense to a prosecution under this section that" in the introductory language of (c); substituted "registered commissioned security guard" for "licensed security guard" in (c)(5); rewrote (c)(8); added (c)(9); and substituted "Carrying a weapon is a Class A misdemeanor" for "(1) Any person who carries a weapon into an establishment that sells alcoholic beverages is guilty of a misdemeanor and subject to a fine of not more than two thousand five hundred dollars ($2,500) or imprisonment for not more than one (1) year, or both. (2) Otherwise, carrying a weapon is a Class A misdemeanor." in (d).

CASE NOTES

Evidence and Proof.

In a case in a youth was adjudicated a juvenile delinquent upon a finding that he had committed the criminal offense of carrying a weapon, in violation of subsection (a) of this section, he unsuccessfully argued that the state did not prove that he knew the knife was there because he was driving a borrowed car, his sending the officer to retrieve his cell phone was inconsistent with such knowledge, and merely being in the car with the knife—what he referred to as joint occupancy—was insufficient evidence to sustain his adjudica-

tion. The issue on appeal was not one of joint occupancy since the youth was alone in the vehicle; therefore, the question was whether there is sufficient evidence to find that he constructively possessed the knife, and the evidence was sufficient to prove that he constructively possessed the knife, and, while trial counsel seemed to have made some argument with regard to the purpose element, such argument was conspicuously absent on appeal. M.S. v. State, 2010 Ark. App. 254, — S.W.3d — (2010).

In a case in a youth was adjudicated a juvenile delinquent upon a finding that he had committed the criminal offense of carrying a weapon, in violation of subsection (a) of this section, he unsuccessfully argued that the search of the car that yielded the weapon should have been suppressed. The intrusion into the vehicle was not a search, but an errand undertaken at the youth's request to retrieve his cell phone, and the knife, or at least the handle, was found in plain sight by a police officer. M.S. v. State, 2010 Ark. App. 254, — S.W.3d — (2010).

5-73-121. [Repealed.]

Publisher's Notes. This section, concerning carrying a knife as a weapon, was repealed by Acts 2007, No. 83, § 1. The section was derived from Acts 1961, No. 457, §§ 1-3; A.S.A. 1947, §§ 41-3171 — 41-3173.

5-73-122. Carrying a firearm in publicly owned buildings or facilities.

(a)(1) Except as provided in § 5-73-322, it is unlawful for any person other than a law enforcement officer or a security guard in the employ of the state or an agency of the state, or any city or county, or any state or federal military personnel, to knowingly carry or possess a loaded firearm or other deadly weapon in any publicly owned building or facility or on the State Capitol grounds.

(2) It is unlawful for any person other than a law enforcement officer or a security guard in the employ of the state or an agency of the state, or any city or county, or any state or federal military personnel, to knowingly carry or possess a firearm, whether loaded or unloaded, in the State Capitol Building or the Justice Building in Little Rock.

(3) However, the provisions of this subsection do not apply to a person carrying or possessing a firearm or other deadly weapon in a publicly owned building or facility or on the State Capitol grounds for the purpose of participating in a shooting match or target practice under the auspices of the agency responsible for the building or facility or grounds or if necessary to participate in a trade show, exhibit, or educational course conducted in the building or facility or on the grounds.

(4) As used in this section, "facility" means a municipally owned or maintained park, football field, baseball field, soccer field, or another similar municipally owned or maintained recreational structure or property.

(b)(1) Any person other than a law enforcement officer, officer of the court, or bailiff, acting in the line of duty, or any other person authorized by the court, who possesses a handgun in the courtroom of any court of this state is guilty of a Class D felony.

(2) Otherwise, any person violating a provision of this section is guilty of a Class A misdemeanor.

History. Acts 1977, No. 549, §§ 1, 2; A.S.A. 1947, §§ 41-3113, 41-3114; Acts 1991, No. 1044, § 1; 1995, No. 1223, § 1; 1997, No. 910, § 1; 2013, No. 226, § 2.

Amendments. The 2013 amendment added "Except as provided in § 5-73-322," in (a)(1).

5-73-124. Tear gas — Pepper spray.

(a)(1) Except as otherwise provided in this section, any person who knowingly carries or has in his or her possession any tear gas or pepper spray in any form, or any person who knowingly carries or has in his or her possession any gun, bomb, grenade, cartridge, or other weapon designed for the discharge of tear gas or pepper spray, upon conviction is guilty of a Class A misdemeanor.

(2)(A) It is lawful for a person to possess or carry, and use, a container of tear gas or pepper spray to be used for self-defense purposes only.

(B) However, the capacity of the container shall not exceed one hundred fifty cubic centimeters (150 cc).

(b) The provisions of this section do not apply to any:

(1) Law enforcement officer while engaged in the discharge of his or her official duties; or

(2) Banking institution desiring to have possession of tear gas or pepper spray in any form for the purpose of securing funds in its custody from theft or robbery.

History. Acts 1949, No. 338, §§ 1-3; 1977, No. 329, §§ 1, 2; A.S.A. 1947, §§ 41-3168 — 41-3170; Acts 1993, No. 674, § 1; 1995, No. 1201, § 1; 2011, No. 1168, § 2; 2013, No. 1125, §§ 18, 19.

Amendments. The 2011 amendment, in (a)(1), inserted "knowingly" and substituted "upon conviction is guilty of a Class A misdemeanor" for "is guilty of a misdemeanor"; deleted "small" preceding "container" in (a)(2)(A); deleted "cartridge or" preceding "container" in (a)(2)(B); and deleted (c).

The 2013 amendment inserted "knowingly" in (a)(1); and substituted "Law enforcement" for "Peace" in (b)(1).

5-73-125. Interstate sale and purchase of shotguns, rifles, and ammunition.

(a) The sale of shotguns and rifles and ammunition in this state to residents of other states is authorized under regulations issued by the Attorney General of the United States under the Gun Control Act of 1968, 18 U.S.C. § 921 et seq., as in effect on January 1, 2009.

(b) A resident of this state may purchase a rifle, shotgun, or ammunition in another state as expressly authorized under the regulations issued under the Gun Control Act of 1968, 18 U.S.C. § 921 et seq., as in effect on January 1, 2009.

History. Acts 1969, No. 159, §§ 1, 2; A.S.A. 1947, §§ 41-3174, 41-3175; Acts 2009, No. 487, § 1.

Amendments. The 2009 amendment substituted "other states" for "adjacent states" and "January 1, 2009" for "March 4, 1969" in (a) and (b); substituted "Attorney General of the United States" for "Secretary of the Treasury" in (a); and made minor stylistic changes.

RESEARCH REFERENCES

ALR. Preemption of State Regulation of Weapons and Other Laws by Federal Gun Control Act. 65 A.L.R.6th 329.

5-73-127. Possession of loaded center-fire weapons in certain areas.

(a) It is unlawful to possess a loaded center-fire weapon, other than a shotgun and other than in a residence or business of the owner, in the following areas:

(1) Baxter County:

(A) That part bounded on the south by Highway 178, on the west and north by Bull Shoals Lake, and on the east by the Central Electric Power Corporation transmission line from Howard Creek to Highway 178;

(B) That part of Bidwell Point lying south of the east-west road which crosses Highway 101 at the Presbyterian Church;

(C) That part of Bidwell Point lying west of Bennett's Bayou and north of the east-west road which crosses Highway 101 at the Presbyterian Church;

(D) That part of Baxter County between:

(i) County Road 139 and Lake Norfork to the north and west;

(ii) County Road 151 and Lake Norfork to the north, west, and south in the Diamond Bay area;

(iii) The Bluff Road and Lake Norfork to the west;

(iv) John Lewis Road (Timber Lake Manor) and Lake Norfork to the west and south;

(v) The south end of County Road 91 south of its intersection with John Lewis Road and Lake Norfork to the south and east; and

(vi) County Road 150 from its intersection with County Road 93 south and Lake Norfork to the south and east but not east of County Road 93;

(2) Benton County:

(A) That part of the Hobbs Estate north of State Highway 12, west of Rambo Road, and south and east of Van Hollow Creek and the Van Hollow Creek arm of Beaver Lake;

(B) All of Bella Vista Village; and

(C) That part bounded on the north by Beaver Lake, on the east by Beaver Lake, on the south by the Hobbs State Management Area boundary from the intersection of State Highway 12 eastward along the boundary to its intersection with the Van Hollow Creek arm of Beaver Lake;

(3) Benton and Carroll Counties: That part bounded on the north by Highway 62, on the east by Highway 187 and Henry Hollow Creek, and the south and west by Beaver Lake and the road from Beaver Dam north to Highway 62;

(4) Conway County: That part lying above the rimrock of Petit Jean Mountain;

(5) Garland County: All of Hot Springs Village and Diamondhead;

(6) Marion County:

(A) That part known as Bull Shoals Peninsula, bounded on the east and north by White River and Lake Bull Shoals, on the west by the Jimmie Creek arm of Lake Bull Shoals, and on the south by the municipal boundaries of the City of Bull Shoals;

(B) That part of Marion County bounded on the north, west, and south by Bull Shoals Lake and on the east by County Roads 355 and 322 from their intersections with State Highway 202 to the points where they respectively dead-end at arms of Bull Shoals Lake;

(C) The Yocum Bend Peninsula of Bull Shoals Lake bounded on the north and east by Bull Shoals Lake, on the west by Pine Mountain and Bull Shoals Lake, and on the south by County Road 30; and

(D) Those lands situated in Marion County known as the Frost Point Peninsula, not inundated by the waters of Bull Shoals Lake, being more particularly described as follows:

(i) Section Six, Township Twenty North, Range Fifteen West, (Sec. 6 — T.20 N. — R.15 W.), lying south of the White River channel;

(ii) Section One, Township Twenty North, Range Sixteen West, (Sec. 1 — T.20 N. — R.16 W.); and

(iii) East Half of Section Two, Township Twenty North, Range Sixteen West, (E ½ Sec. 2 — T.20 N. — R.16 W.); North Half of the Northeast Quarter of Section Eleven, Township Twenty North, Range Sixteen West (N ½ — NE ¼ Sec. 11 — T.20 N. — R.16 W.); and

(7) A platted subdivision located in an unincorporated area.

(b) Nothing contained in this section shall be construed to limit or restrict or to make unlawful the discharge of a firearm in defense of a person or property within the areas described in this section.

(c) A person who is found guilty or who pleads guilty or nolo contendere to violating this section is guilty of a violation and shall be fined no less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500).

(d) This section does not apply to a:

(1) Law enforcement officer in the performance of his or her duties;

(2) Discharge of a center-fire weapon at a firing range maintained for the discharging of a center-fire weapon; or

(3) Person possessing a valid concealed handgun license under § 5-73-301 et seq.

History. Acts 1985, No. 515, §§ 1-3; 1987, No. 829, § 1; 1989, No. 63, § 1; 1991, No. 148, § 1; 1991, No. 731, § 1; 1993, No. 1099, § 1; 2007, No. 52, § 1; 2009, No. 748, § 40.

Amendments. The 2009 amendment inserted "is guilty of a violation and" in (c), and made a minor stylistic change.

5-73-130. Seizure and forfeiture of firearm — Seizure and forfeiture of motor vehicle — Disposition of property seized.

(a) If a person under eighteen (18) years of age is unlawfully in possession of a firearm, the firearm shall be seized and, after an adjudication of delinquency or a conviction, is subject to forfeiture.

(b) If a felon or a person under eighteen (18) years of age is unlawfully in possession of a firearm in a motor vehicle, the motor vehicle is subject to seizure and, after an adjudication of delinquency or a conviction, subject to forfeiture.

(c) As used in this section, "unlawfully in possession of a firearm" does not include any act of possession of a firearm that is prohibited only by:

(1) Section 5-73-127, unlawful to possess loaded center-fire weapons in certain areas; or

(2) A regulation of the Arkansas State Game and Fish Commission.

(d) The procedures for forfeiture and disposition of the seized property is as follows:

(1) The prosecuting attorney of the judicial district within whose jurisdiction the property is seized that is sought to be forfeited shall promptly proceed against the property by filing in the circuit court a petition for an order to show cause why the circuit court should not order forfeiture of the property; and

(2) The petition shall be verified and shall set forth:

(A) A statement that the action is brought pursuant to this section;

(B) The law enforcement agency bringing the action;

(C) A description of the property sought to be forfeited;

(D) A statement that on or about a date certain there was an adjudication of delinquency or a conviction and a finding that the property seized is subject to forfeiture;

(E) A statement detailing the facts in support of subdivision (d)(1) of this section; and

(F) A list of all persons known to the law enforcement agency, after diligent search and inquiry, who may claim an ownership interest in the property by title or registration or by virtue of a lien allegedly perfected in the manner prescribed by law.

(e)(1) Upon receipt of a petition complying with the requirements of subdivision (d)(1) of this section, the circuit court judge having jurisdiction shall issue an order to show cause setting forth a statement that this subchapter is the controlling law.

(2) In addition, the order shall set a date at least forty-one (41) days from the date of first publication of the order pursuant to subsection (f) of this section for all persons claiming an interest in the property to file such pleadings as they desire as to why the circuit court should not order the forfeiture of the property for use, sale, or other disposition by the law enforcement agency seeking forfeiture of the property.

(3) The circuit court shall further order that any person who does not appear on that date is deemed to have defaulted and waived any claim to the subject property.

(f)(1) The prosecuting attorney shall give notice of the forfeiture proceedings by:

(A) Causing a copy of the order to show cause to be published two (2) times each week for two (2) consecutive weeks in a newspaper having general circulation in the county where the property is located with the last publication being not less than five (5) days before the show cause hearing; and

(B) Sending a copy of the petition and order to show cause by certified mail, return receipt requested, to each person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure if:

(i) The property is of a type for which title or registration is required by law;

(ii) The owner of the property is known in fact to the law enforcement agency at the time of seizure; or

(iii) The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.

(2) The law enforcement agency is only obligated to make diligent search and inquiry as to the owner of the property, and if, after diligent search and inquiry, the law enforcement agency is unable to ascertain the owner, the requirement of actual notice by mail with respect to a person having a perfected security interest in the property is not applicable.

(g) At the hearing on the matter, the petitioner has the burden to establish that the property is subject to forfeiture by a preponderance of the evidence.

(h) In determining whether or not a motor vehicle should be ordered forfeited, the circuit court may take into consideration the following factors:

(1) Any prior criminal conviction or delinquency adjudication of the felon or juvenile;

(2) Whether or not the firearm was used in connection with any other criminal act;

(3) Whether or not the vehicle was used in connection with any other criminal act;

(4) Whether or not the juvenile or felon was the lawful owner of the vehicle in question;

(5) If the juvenile or felon is not the lawful owner of the vehicle in question, whether or not the lawful owner knew of the unlawful act being committed that gives rise to the forfeiture penalty; and

(6) Any other factor the circuit court deems relevant.

(i) The final order of forfeiture by the circuit court shall perfect in the law enforcement agency right, title, and interest in and to the property and shall relate back to the date of the seizure.

(j) Physical seizure of property is not necessary in order to allege in a petition under this section that the property is forfeitable.

(k) Upon filing the petition, the prosecuting attorney for the judicial district may also seek such protective orders as are necessary to prevent the transfer, encumbrance, or other disposal of any property named in the petition.

(l) The law enforcement agency to which the property is forfeited shall:

(1) Destroy any forfeited firearm; and

(2) Either:

(A) Sell the motor vehicle in accordance with subsection (m) of this section; or

(B) If the motor vehicle is not subject to a lien that has been preserved by the circuit court, retain the motor vehicle for official use.

(m)(1) If a law enforcement agency desires to sell a forfeited motor vehicle, the law enforcement agency shall first cause notice of the sale to be made by publication at least two (2) times a week for two (2) consecutive weeks in a newspaper having general circulation in the county and by sending a copy of the notice of the sale by certified mail, return receipt requested, to each person having ownership of or a security interest in the property or in the manner provided in Rule 4 of the Arkansas Rules of Civil Procedure if:

(A) The property is of a type for which title or registration is required by law;

(B) The owner of the property is known in fact to the law enforcement agency at the time of seizure; or

(C) The property is subject to a security interest perfected in accordance with the Uniform Commercial Code, § 4-1-101 et seq.

(2) The notice of the sale shall include the time, place, and conditions of the sale and a description of the property to be sold.

(3) The property shall then be disposed of at public auction to the highest bidder for cash without appraisal.

(n) The proceeds of any sale and any moneys forfeited shall be applied to the payment of:

(1) The balance due on any lien preserved by the circuit court in the forfeiture proceedings;

(2) The cost incurred by the seizing law enforcement agency in connection with the storage, maintenance, security, and forfeiture of the property;

(3) The costs incurred by the prosecuting attorney or attorney for the law enforcement agency, approved by the prosecuting attorney, to which the property is forfeited; and

(4) Costs incurred by the circuit court.

(o) The remaining proceeds or moneys shall be deposited into a special county fund to be titled the "Juvenile Crime Prevention Fund", and the moneys in the fund shall be used solely for making grants to community-based nonprofit organizations that work with juvenile crime prevention and rehabilitation.

History. Acts 1994 (2nd Ex. Sess.), No. 55, § 1; 1994 (2nd Ex. Sess.), No. 56, § 1; 2005, No. 1994, § 260; 2007, No. 827, § 96.

5-73-131. Possession or use of weapons by incarcerated persons.

CASE NOTES

Analysis

In General.
Construction.
Mental State.

In General.

Where a deputy found that defendant had an improvised weapon hidden in his sock while incarcerated at the county jail, the state was not required to show how defendant intended to use the weapon in order to convict him of possession of a weapon by an incarcerated person. Owens v. State, 92 Ark. App. 480, 215 S.W.3d 681 (2005).

Construction.

The phrase, "or other implement for the infliction of serious physical injury or death and which serves no common lawful purpose," is plainly intended to include the wide variety of objects that can be fashioned into dangerous weapons in an incarcerated setting without attempting to set them forth in an exhaustive list; a length of sharpened wire with a cloth handle is obviously a weapon that could potentially cause serious physical injury and is the sort of object intended by the catch-all phrase. Owens v. State, 92 Ark. App. 480, 215 S.W.3d 681 (2005).

Mental State.

Although there is no specified culpable mental state mentioned, this section does not create a strict liability offense; knowing possession is plainly all that is necessary to violate the statute. Owens v. State, 92 Ark. App. 480, 215 S.W.3d 681 (2005).

Subchapter 2 — Uniform Machine Gun Act

5-73-205. Presumption of offensive or aggressive purpose.

(a) Possession or use of a machine gun is presumed to be for an offensive or aggressive purpose:

(1) When the machine gun is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun may be found;

(2) When in the possession of or used by an unnaturalized foreign-born person or a person who has been convicted of a crime of violence in any court of record, state or federal, of the United States of America, its territories or insular possessions;

(3) [Repealed.]

(4) When empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of use in the machine gun are found in the immediate vicinity of the machine gun.

(b) A machine gun is exempt from the presumption of offensive or aggressive purpose if:

(1) The machine gun has been registered to a corporation in the business of manufacturing ammunition or a representative of the

corporation under the National Firearms Act, 26 U.S.C. § 5801 et seq., or the Gun Control Act, 18 U.S.C. § 921 et seq.;

(2) The machine gun is being used primarily to test ammunition in a nonoffensive and nonaggressive manner by the corporation or the corporation's representative that the machine gun is registered to; and

(3) The corporation or the corporation's representative is not prohibited from the possession of a firearm by any state or federal law.

History. Acts 1935, No. 80, § 4; Pope's Dig., § 3517; A.S.A. 1947, § 41-3160; Acts 2003, No. 1352, § 1; 2007, No. 827, § 97.

5-73-208. Registration by manufacturers.

(a) Every manufacturer shall keep a register of all machine guns manufactured or handled by the manufacturer.

(b) This register shall show:

(1) The model and serial number, date of manufacture, sale, loan, gift, delivery, or receipt, of every machine gun, the name, address, and occupation of the person to whom the machine gun was sold, loaned, given, or delivered, or from whom it was received; and

(2) The purpose for which it was acquired by the person to whom the machine gun was sold, loaned, given, or delivered, or from whom received.

(c) Upon demand every manufacturer shall permit any marshal, sheriff, or police officer to inspect the manufacturer's entire stock of machine guns, parts, and supplies therefor, and shall produce the register, required by this section, for inspection.

(d) A violation of this section is a violation punishable by a fine of not less than one hundred dollars ($100).

History. Acts 1935, No. 80, § 7; Pope's Dig., § 3520; A.S.A. 1947, § 41-3163; Acts 2009, No. 748, § 41.

Amendments. The 2009 amendment in (d), inserted the second instance of "a violation," "one," and "($100)," and made a minor stylistic change.

5-73-210. [Repealed.]

Publisher's Notes. This section, concerning search warrants, was repealed by Acts 2013, No. 1348, § 18. The section was derived from Acts 1935, No. 80, § 9; Pope's Dig., § 3522; A.S.A. 1947, § 41-3165; Acts 2005, No. 1994, § 247.

Subchapter 3 — Concealed Handguns

Effective Dates. Acts 2009, No. 294, § 30: Mar. 3, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that on-premises consumption outlets in the State of Arkansas are not able to compete on an equal and similar basis with outlets located in states surrounding the State of Arkansas; that the State of Arkansas is in need of additional revenues; that only minor adjustments to the violation fine schedule have been made since its passage in 1981; and that this act is immediately necessary to raise additional revenues and to better address violations committed by Alcoholic Beverage Control Division permit holders. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2013, No. 67, § 2: Feb. 11, 2013. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that personal security is increasingly important; that the Second Amendment of the Constitution of the United States ensures a person's right to bear arms; and that this act is immediately necessary because a person should be allowed to carry a firearm in a church that permits the carrying of a firearm for personal security. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2013, No. 1271, § 3: Apr. 16, 2013. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that a concealed handgun can be used to protect oneself from harm; that certain persons are more susceptible to harm from other persons; and that this act is immediately necessary because a reduced fee for a concealed carry license will make it easier for certain persons to protect themselves. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

5-73-301. Definitions.

As used in this subchapter:

(1) "Acceptable electronic format" means an electronic image produced on the person's own cellular phone or other type of portable electronic device that displays all of the information on a concealed handgun license as clearly as an original concealed handgun license;

(2) "Concealed" means to cover from observation so as to prevent public view;

(3) "Convicted" means that a person pleaded guilty or nolo contendere to or was found guilty of a criminal offense;

(4) "Handgun" means any firearm, other than a fully automatic firearm, with a barrel length of less than twelve inches (12″) that is designed, made, or adapted to be fired with one (1) hand; and

(5) "Licensee" means a person granted a valid license to carry a concealed handgun pursuant to this subchapter.

History. Acts 1995, No. 411, § 1; 1995, No. 419, § 1; 1997, No. 1239, § 1; 2007, No. 664, § 1; 2007, No. 827, §§ 98, 99; 2013, No. 419, § 1.

Amendments. The 2013 amendment added present (1).

RESEARCH REFERENCES

ALR. Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons. 33 A.L.R.6th 407.

5-73-302. Authority to issue license.

(a) The Director of the Department of Arkansas State Police may issue a license to carry a concealed handgun to a person qualified as provided in this subchapter.

(b)(1) For new licenses issued after July 31, 2007, the license to carry a concealed handgun is valid throughout the state for a period of five (5) years from the date of issuance.

(2) After July 31, 2007, upon renewal, an existing valid license to carry a concealed handgun shall be issued for a period of five (5) years.

(c)(1)(A) After July 31, 2007, a license or renewal of a license issued to a former elected or appointed sheriff of any county of this state shall be issued for a period of five (5) years.

(B) The license issued to a former elected or appointed sheriff is revocable on the same grounds as other licenses.

(2)(A) The former elected or appointed sheriff shall meet the same qualifications as all other applicants.

(B) However, the former elected or appointed sheriff is exempt from the fee prescribed by § 5-73-311(a)(2) and from the training requirements of § 5-73-309(13) for issuance.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 389, § 1; 2007, No. 1014, §§ 1, 3.

RESEARCH REFERENCES

ALR. Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons. 33 A.L.R.6th 407.

5-73-304. Exemptions.

(a)(1)(A) A current or former certified law enforcement officer, chief of police, court bailiff, or county sheriff is exempt from the licensing requirements of this subchapter if otherwise authorized to carry a concealed handgun.

(B) A former certified law enforcement officer whose employment was terminated by a law enforcement agency due to disciplinary reasons or because he or she committed a disqualifying criminal offense is not exempt from the licensing requirements of this subchapter.

(2) Solely for purposes of this subchapter, an auxiliary law enforcement officer certified by the Arkansas Commission on Law Enforcement Standards and Training and approved by the county sheriff of the county where he or she is acting as an auxiliary law enforcement officer is deemed to be a certified law enforcement officer.

(b) An auxiliary law enforcement officer or employee of a local detention facility is exempt from the licensing requirements of this subchapter if the auxiliary law enforcement officer or employee of a local detention facility:

(1) If an auxiliary law enforcement officer, has completed the minimum training requirements and is certified as an auxiliary law enforcement officer in accordance with the commission; and

(2) Is authorized in writing as exempt from the licensing requirements of this subchapter by the chief of police or county sheriff that has appointed the auxiliary law enforcement officer or employs the employee of a local detention facility.

(c) The authorization prescribed in subdivision (b)(2) of this section shall be carried on the person of the auxiliary law enforcement officer or employee of a local detention facility and be produced upon demand at the request of any law enforcement officer or owner or operator of any of the prohibited places as set out in § 5-73-306.

(d) As used in this section, "employee of a local detention facility" means a person who:

(1) Is employed by a county sheriff or municipality that operates a local detention facility and whose job duties include:

(A) Securing a local detention facility;

(B) Monitoring inmates in a local detention facility; and

(C) Administering the daily operation of the local detention facility; and

(2) Has completed the minimum training requirements for his or her position.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 696, § 1; 1997, No. 1239, § 8; 1999, No. 1508, §§ 1, 7; 2013, No. 415, § 1; 2013, No. 1220, § 1.

Amendments. The 2013 amendment by No. 415 rewrote (a) and (b).

The 2013 amendment by No. 1220 inserted "or employee of a local detention facility" twice in (b); added "If an auxiliary law enforcement officer" to the beginning of (b)(1); rewrote (b)(2); inserted "or employee of a local detention facility" in (c); and added (d).

5-73-305. Criminal penalty.

RESEARCH REFERENCES

ALR. Constitutionality of State Statutes and Local Ordinances Regulating Concealed Weapons. 33 A.L.R.6th 407.

5-73-306. Prohibited places.

No license to carry a concealed handgun issued pursuant to this subchapter authorizes any person to carry a concealed handgun into:

(1) Any police station, sheriff's station, or Department of Arkansas State Police station;

(2) Any Arkansas Highway Police Division of the Arkansas State Highway and Transportation Department facility;

(3)(A) Any building of the Arkansas State Highway and Transportation Department or onto grounds adjacent to any building of the Arkansas State Highway and Transportation Department.

(B) However, subdivision (3)(A) of this section does not apply to a rest area or weigh station of the Arkansas State Highway and Transportation Department;

(4) Any detention facility, prison, or jail;

(5) Any courthouse;

(6)(A) Any courtroom.

(B) However, nothing in this subchapter precludes a judge from carrying a concealed weapon or determining who will carry a concealed weapon into his or her courtroom;

(7) Any polling place;

(8) Any meeting place of the governing body of any governmental entity;

(9) Any meeting of the General Assembly or a committee of the General Assembly;

(10) Any state office;

(11) Any athletic event not related to firearms;

(12) Any portion of an establishment, except a restaurant as defined in § 3-5-1202, licensed to dispense alcoholic beverages for consumption on the premises;

(13) Any portion of an establishment, except a restaurant as defined in § 3-5-1202, where beer or light wine is consumed on the premises;

(14)(A) A school, college, community college, or university campus building or event, unless for the purpose of participating in an

authorized firearms-related activity or otherwise provided for in § 5-73-322.

(B) However, subdivision (14)(A) of this section does not apply to a kindergarten through grade twelve (K-12) private school operated by a church or other place of worship that:

(i) Is located on the developed property of the kindergarten through grade twelve (K-12) private school;

(ii) Allows the licensee to carry a concealed handgun into the church or other place of worship under this section; and

(iii) Allows the licensee to possess a concealed handgun on the developed property of the kindergarten through grade twelve (K-12) private school under § 5-73-119(e);

(15) Inside the passenger terminal of any airport, except that no person is prohibited from carrying any legal firearm into the passenger terminal if the firearm is encased for shipment for purposes of checking the firearm as baggage to be lawfully transported on any aircraft;

(16)(A) Any church or other place of worship.

(B) However, this subchapter does not preclude a church or other place of worship from determining who may carry a concealed handgun into the church or other place of worship;

(17) Any place where the carrying of a firearm is prohibited by federal law;

(18) Any place where a parade or demonstration requiring a permit is being held, and the licensee is a participant in the parade or demonstration; or

(19)(A)(i) Any place at the discretion of the person or entity exercising control over the physical location of the place by placing at each entrance to the place a written notice clearly readable at a distance of not less than ten feet (10') that "carrying a handgun is prohibited".

(ii)*(a)* If the place does not have a roadway entrance, there shall be a written notice placed anywhere upon the premises of the place.

(b) In addition to the requirement of subdivision (19)(A)(ii)*(a)* of this section, there shall be at least one (1) written notice posted within every three (3) acres of a place with no roadway entrance.

(iii) A written notice as described in subdivision (19)(A)(i) of this section is not required for a private home.

(iv) Any licensee entering a private home shall notify the occupant that the licensee is carrying a concealed handgun.

(B) Subdivision (19)(A) of this section does not apply if the physical location is a public university, public college, or community college, as defined in § 5-73-322, and the licensee is carrying a concealed handgun as provided under § 5-73-322.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 2; 2003, No. 1110, § 1; 2007, No. 664, § 2; 2009, No. 294, § 28; 2011, No. 758, § 1; 2013, No. 67, § 1; 2013, No. 226, §§ 3, 4; 2013, No. 1390, § 2.

Amendments. The 2009 amendment substituted "§ 3-9-202" for "§ 3-9-402" in (12) and (13).

The 2011 amendment substituted "§ 3-5-1202" for "§ 3-9-202" in (12) and (13).

The 2013 amendment by No. 67 redesignated (16) as (16)(A), and added (16)(B).

The 2013 amendment by No. 226 redesignated former (19)(A) as (19)(A)(i); redesignated former (19)(B) through (19)(D) as (19)(A)(ii) through (19)(A)(iv); and added (19)(B).

The 2013 amendment by No. 1390 redesignated former (14) as present (14)(A), and inserted "or otherwise provided for in § 5-73-322" at the end; and inserted (14)(B) and redesignated the remaining subdivisions accordingly.

5-73-307. List of license holders.

(a) The Department of Arkansas State Police shall maintain an automated listing of license holders and this information shall be available on-line, upon request, at any time, to any law enforcement agency through the Arkansas Crime Information Center.

(b) Nothing in this subchapter shall be construed to require or allow the registration, documentation, or providing of a serial number with regard to any firearm.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 3; 2007, No. 827, § 100.

5-73-308. License — Issuance or denial.

(a)(1)(A) The Director of the Department of Arkansas State Police may deny a license if within the preceding five (5) years the applicant has been found guilty of one (1) or more crimes of violence constituting a misdemeanor or for the offense of carrying a weapon.

(B) The director may revoke a license if the licensee has been found guilty of one (1) or more crimes of violence within the preceding three (3) years.

(2) Subdivision (a)(1) of this section does not apply to a misdemeanor that has been expunged or for which the imposition of sentence was suspended.

(3) Upon notification by any law enforcement agency or a court and subsequent written verification, the director shall suspend a license or the processing of an application for a license if the licensee or applicant is arrested or formally charged with a crime that would disqualify the licensee or applicant from having a license under this subchapter until final disposition of the case.

(b)(1) The director may deny a license to carry a concealed handgun if the county sheriff or chief of police, if applicable, of the applicant's place of residence or the director or the director's designee submits an affidavit that the applicant has been or is reasonably likely to be a danger to himself or herself or others or to the community at large, as demonstrated by past patterns of behavior or participation in an incident involving unlawful violence or threats of unlawful violence, or if the applicant is under a criminal investigation at the time of applying for a license to carry a concealed handgun.

(2) Within one hundred twenty (120) days after the date of receipt of the items listed in § 5-73-311(a), the director shall:

(A) Issue the license; or

(B) Deny the application based solely on the ground that the applicant fails to qualify under the criteria listed in this subchapter.

(3)(A) If the director denies the application, the director shall notify the applicant in writing, stating the grounds for denial.

(B) The decision of the director is subject to appeal under the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 4; 2011, No. 758, § 2; 2013, No. 1328, § 1.

Amendments. The 2011 amendment, in (b)(1), inserted "to carry a concealed handgun" twice, inserted "county" preceding "sheriff," and deleted "as the result of the applicant's mental or psychological state" following "at large."

The 2013 amendment inserted "or the director or the director's designee" in (b)(1); and substituted "subject to appeal under the Arkansas Administrative Procedure Act, § 25-15-201 et seq." for "final" in (b)(3)(B).

5-73-309. License — Requirements.

The Director of the Department of Arkansas State Police shall issue a license to carry a concealed handgun if the applicant:

(1) Is a citizen of the United States;

(2)(A) Is a resident of the state and has been a resident continuously for ninety (90) days or longer immediately preceding the filing of the application.

(B) However, subdivision (2)(A) of this section does not apply to any:

(i) Retired city, county, state, or federal law enforcement officer; or

(ii) Active duty member of the United States armed forces who submits documentation of his or her active duty status; or

(iii) Spouse of an active duty member of the United States armed forces who submits documentation of his or her spouse's active duty status;

(3) Is twenty-one (21) years of age or older;

(4) Does not suffer from a mental or physical infirmity that prevents the safe handling of a handgun and has not threatened or attempted suicide;

(5)(A) Has not been convicted of a felony in a court of this state, of any other state, or of the United States without having been pardoned for conviction and had firearms possession rights restored.

(B) A record of a conviction that has been sealed or expunged under Arkansas law does not render an applicant ineligible to receive a concealed handgun license if:

(i) The applicant was sentenced prior to March 13, 1995; or

(ii) The order sealing or expunging the applicant's record of conviction complies with § 16-90-605;

(6) Is not subject to any federal, state, or local law that makes it unlawful to receive, possess, or transport any firearm, and has had his or her background check successfully completed through the Depart-

ment of Arkansas State Police and the Federal Bureau of Investigation's National Instant Criminal Background Check System;

(7)(A) Does not chronically or habitually abuse a controlled substance to the extent that his or her normal faculties are impaired.

(B) It is presumed that an applicant chronically and habitually uses a controlled substance to the extent that his or her faculties are impaired if the applicant has been voluntarily or involuntarily committed to a treatment facility for the abuse of a controlled substance or has been found guilty of a crime under the provisions of the Uniform Controlled Substances Act, § 5-64-101 et seq., or a similar law of any other state or the United States relating to a controlled substance within the three-year period immediately preceding the date on which the application is submitted;

(8)(A) Does not chronically or habitually use an alcoholic beverage to the extent that his or her normal faculties are impaired.

(B) It is presumed that an applicant chronically and habitually uses an alcoholic beverage to the extent that his or her normal faculties are impaired if the applicant has been voluntarily or involuntarily committed as an alcoholic to a treatment facility or has been convicted of two (2) or more offenses related to the use of alcohol under a law of this state or similar law of any other state or the United States within the three-year period immediately preceding the date on which the application is submitted;

(9) Desires a legal means to carry a concealed handgun to defend himself or herself;

(10) Has not been adjudicated mentally incompetent;

(11) Has not been voluntarily or involuntarily committed to a mental institution or mental health treatment facility;

(12) Is not a fugitive from justice or does not have an active warrant for his or her arrest;

(13) Has satisfactorily completed a training course as prescribed and approved by the director; and

(14) Signs a statement of allegiance to the United States Constitution and the Arkansas Constitution.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 368, § 1; 1997, No. 1239, § 10; 1999, No. 51, § 1; 2003, No. 545, §§ 1, 5; 2007, No. 198, § 1; 2007, No. 664, § 3; 2013, No. 989, § 1.

Amendments. The 2013 amendment added substituted "member of the United States armed forces" for "military personnel" in (2)(B)(ii) and added (2)(B)(iii).

5-73-311. Application procedure.

(a) The applicant for a license to carry a concealed handgun shall submit the following to the Department of Arkansas State Police:

(1) A completed application, as described in § 5-73-310;

(2) A nonrefundable license fee of one hundred dollars ($100), except that the nonrefundable license fee is fifty dollars ($50.00) if the applicant is sixty-five (65) years of age or older;

(3)(A) A full set of fingerprints of the applicant.

(B) In the event a legible set of fingerprints, as determined by the department and the Federal Bureau of Investigation, cannot be obtained after a minimum of two (2) attempts, the Director of the Department of Arkansas State Police shall determine eligibility in accordance with criteria that the department shall establish by promulgating rules.

(C) Costs for processing the set of fingerprints as required in subdivision (a)(3)(A) of this section shall be borne by the applicant;

(4)(A) A waiver authorizing the department access to any medical, criminal, or other records concerning the applicant and permitting access to all of the applicant's criminal records.

(B) If a check of the applicant's criminal records uncovers any unresolved felony arrests over ten (10) years old, then the applicant shall obtain a letter of reference from the county sheriff, prosecuting attorney, or circuit judge of the county where the applicant resides that states that to the best of the county sheriff's, prosecuting attorney's, or circuit judge's knowledge that the applicant is of good character and free of any felony convictions.

(C) The department shall maintain the confidentiality of the medical, criminal, or other records; and

(5) A digital photograph of the applicant or a release authorization to obtain a digital photograph of the applicant from another source.

(b)(1) Upon receipt of the items listed in subsection (a) of this section, the department shall forward the full set of fingerprints of the applicant to the appropriate agencies for state and federal processing.

(2)(A) The department shall forward a notice of the applicant's application to the sheriff of the applicant's county of residence and, if applicable, the police chief of the applicant's municipality of residence.

(B)(i) The sheriff of the applicant's county of residence and, if applicable, the police chief of the applicant's municipality of residence may participate, at his or her discretion, in the process by submitting a voluntary report to the department containing any readily discoverable information that he or she feels may be pertinent to the licensing of any applicant.

(ii) The reporting under subdivision (b)(2)(B)(i) of this section shall be made within thirty (30) days after the date the notice of the application was sent by the department.

(c) A concealed handgun license issued, renewed, or obtained under § 5-73-314 or § 5-73-319 after December 31, 2007, shall bear a digital photograph of the licensee.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, § 9; 1997, No. 1251, § 1; 1999, No. 487, § 1; 2007, No. 664, § 4; 2009, No. 748, § 42; 2013, No. 1271, § 1.

Amendments. The 2009 amendment inserted "under subdivision (b)(2)(B)(i) of this section" in (b)(2)(B)(ii).

The 2013 amendment added "except that the nonrefundable license fee is fifty dollars ($50.00) if the applicant is sixty-five (65) years of age or older" in (a)(2).

5-73-312. Revocation.

(a)(1) A license to carry a concealed handgun issued under this subchapter shall be revoked if the licensee becomes ineligible under the criteria set forth in § 5-73-308(a) or § 5-73-309.

(2)(A) Any law enforcement officer making an arrest of a licensee for a violation of this subchapter or any other statutory violation that requires revocation of a license to carry a concealed handgun shall confiscate the license and forward it to the Director of the Department of Arkansas State Police.

(B) The license shall be held until a determination of the charge is finalized, with the appropriate disposition of the license after the determination.

(b) When the Department of Arkansas State Police receives notification from any law enforcement agency or court that a licensee has been found guilty or has pleaded guilty or nolo contendere to any crime involving the use of a weapon, the license issued under this subchapter is immediately revoked.

(c) The director shall revoke the license of any licensee who has pleaded guilty or nolo contendere to or been found guilty of an alcohol-related offense committed while carrying a handgun.

History. Acts 1995, No. 411, §§ 2, 4, 5; 1995, No. 419, §§ 2, 4, 5; 1997, No. 1239, § 101. § 11; 2003, No. 545, § 4; 2007, No. 827,

5-73-313. Expiration and renewal.

(a) Except as provided in subdivision (f)(1) of this section, the licensee may renew his or her license no more than ninety (90) days prior to the expiration date by submitting to the Department of Arkansas State Police:

(1) A renewal form prescribed by the department;

(2) A verified statement that the licensee remains qualified pursuant to the criteria specified in §§ 5-73-308(a) and 5-73-309;

(3) A renewal fee of thirty-five dollars ($35.00);

(4) A certification or training form properly completed by the licensee's training instructor reflecting that the licensee's training was conducted; and

(5) A digital photograph of the licensee or a release authorization to obtain a digital photograph of the licensee from another source.

(b) The license shall be renewed upon receipt of the completed renewal application, a digital photograph of the licensee, and appropriate payment of fees subject to a background investigation conducted pursuant to this subchapter that did not reveal any disqualifying offense or unresolved arrest that would disqualify a licensee under this subchapter.

(c) Additionally, a licensee who fails to file a renewal application on or before the expiration date shall renew his or her license by paying a late fee of fifteen dollars ($15.00).

(d)(1) No license shall be renewed six (6) months or more after its expiration date, and the license is deemed to be permanently expired.

(2)(A) A person whose license has been permanently expired may reapply for licensure.

(B) An application for licensure and fees pursuant to §§ 5-73-308(a), 5-73-309, and 5-73-311(a) shall be submitted, and a new background investigation shall be conducted.

(e) A new criminal background investigation shall be conducted when an applicant applies for renewal of a license. Costs for processing a new background check shall be paid by the applicant.

(f)(1) An active duty member of the armed forces of the United States, a member of the National Guard, or a member of a reserve component of the armed forces of the United States, who is on active duty outside this state may renew his or her license within thirty (30) days after the person returns to this state by submitting to the department:

(A) Proof of assignment outside of this state on the expiration date of the license; and

(B) The items listed in subdivisions (a)(1)-(5) of this section.

(2) Subsections (c) and (d) of this section shall not apply to a person who renews his or her license under subdivision (f)(1) of this section.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 1997, No. 1239, §§ 6, 12; 1999, No. 487, § 2; 2003, No. 545, § 2; 2005, No. 881, § 1; 2007, No. 664, § 5.

5-73-314. Lost, destroyed, or duplicate license — Change of address.

(a) Within thirty (30) days after the changing of a permanent address, or within thirty (30) days after having a license to carry a concealed handgun lost, the licensee shall notify the Director of the Department of Arkansas State Police in writing of the change or loss.

(b) If a license to carry a concealed handgun is lost or destroyed, or a duplicate is requested, the person to whom the license to carry a concealed handgun was issued shall comply with the provisions of subsection (a) of this section and may obtain a duplicate license or replacement license upon:

(1) Paying the Department of Arkansas State Police a fee established by the director under the Arkansas Administrative Procedure Act, § 25-15-201 et seq.; and

(2) Furnishing a notarized statement to the department that the license to carry a concealed handgun has been lost or that a duplicate is requested.

(c) The fee described in subdivision (b)(1) of this section shall be reduced by fifty percent (50%) if a person described in § 5-73-311(a)(2) is requesting a replacement or duplicate license under this section.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 2011, No. 758, § 3; 2013, No. 1271, § 2.

Amendments. The 2011 amendment, in (a), substituted "having a license to carry a concealed handgun lost" for "having a license or handgun lost or disposed of" and deleted "or disposition" at the end; in the introductory paragraph of (b), deleted "concealed handgun" following "If a" and inserted "to carry a concealed handgun" twice; and, in (b)(2), deleted "handgun or" preceding "license" and "or disposed of" at the end.

The 2013 amendment inserted "or duplicate" following "destroyed" in the section heading; inserted "or a duplicate is requested" in (b); substituted "Paying" for "Payment to" in (b)(1); added "or that a duplicate is requested" in (b)(2); and added (c).

5-73-315. Possession of license — Identification of licensee.

(a) Any licensee possessing a valid license issued pursuant to this subchapter may carry a concealed handgun.

(b) The licensee shall:

(1) Carry the license, or an electronic copy of the license in an acceptable electronic format, together with valid identification, at any time when the licensee is carrying a concealed handgun; and

(2) Display both the license, or an electronic copy of the license in an acceptable electronic format, and proper identification upon demand by a law enforcement officer.

(c) The presentment of proof of a license to carry a concealed handgun in electronic form does not:

(1) Authorize a search of any other content of an electronic device without a search warrant or probable cause; or

(2) Expand or restrict the authority of a law enforcement officer to conduct a search or investigation.

History. Acts 1995, No. 411, § 2; 1995, No. 419, § 2; 2007, No. 827, § 102; 2013, No. 419, § 2.

Amendments. The 2013 amendment added "or an electronic copy of the license in an acceptable electronic format" in (b)(1) and (b)(2); and added (c).

5-73-319. Transfer of a license to Arkansas.

(a) Any person who becomes a resident of Arkansas who has a valid license to carry a concealed handgun issued by a reciprocal state may apply to transfer his or her license to Arkansas by submitting the following to the Department of Arkansas State Police:

(1) The person's current reciprocal state license;

(2) Two (2) properly completed fingerprint cards;

(3) A nonrefundable license fee of thirty-five dollars ($35.00);

(4) Any fee charged by a state or federal agency for a criminal history check; and

(5) A digital photograph of the person or a release authorization to obtain a digital photograph of the person from another source.

(b) After July 31, 2007, the newly transferred license is valid for a period of five (5) years from the date of issuance and binds the holder to all Arkansas laws and regulations regarding the carrying of the concealed handgun.

History. Acts 2003, No. 545, § 3; 2007, No. 664, § 26; 2007, No. 1014, § 2.

5-73-320. License for certain members of the Arkansas National Guard or a reserve component or active duty military personnel.

(a) The Department of Arkansas State Police may issue a license under this subchapter to a person who:

(1) Is currently serving as a federally recognized commissioned or noncommissioned officer of the National Guard or a reserve component of the armed forces of the United States or an active duty member of the armed forces of the United States;

(2) Submits the following documents:

(A) A completed concealed handgun license application as prescribed by the department;

(B) A form specified by the Director of the Department of Arkansas State Police reflecting the fingerprints of the applicant;

(C) A properly completed and dated certificate from a concealed handgun carry training instructor who is registered with the department;

(D) A live-fire qualification issued or granted by a branch of the United States armed forces or, in lieu of a live-fire qualification, a letter dated and personally signed by a commanding officer or his or her designee stating that the applicant:

(i) Is a current member of the National Guard or a reserve component of the armed forces of the United States or an active duty member of the armed forces of the United States;

(ii) Is of good character and sound judgment; and

(iii) Has met the military qualification requirements for issuance and operation of a handgun within one (1) year of the application date;

(E) A copy of the face or photograph side of a current United States Uniformed Services military identification card, if the applicant is a member of the armed forces; and

(F) An electronic passport-style photo of the applicant, if the applicant does not hold an Arkansas driver's license or identification card; and

(3) Submits any required fees.

(b) Except as otherwise specifically stated in this section, the license issued under this section is subject to the provisions of this subchapter and any rules promulgated under § 5-73-317.

History. Acts 2005, No. 1868, § 1; 2007, No. 664, § 7; 2007, No. 1014, § 3; 2013, No. 989, § 2.

Amendments. The 2013 amendment added (a)(2)(C) and redesignated former (C) as (D) and added "A live-fire qualification issued or granted by a branch of the United States armed forces or, in lieu of a live fire qualification" to present (D) and deleted former (iii), (v), and redesignated

the remaining subsections accordingly; deleted former (D) and added (F); deleted (b) and redesignated former (c) as (b).

5-73-321. Recognition of other states' licenses.

A person in possession of a valid license to carry a concealed handgun issued to the person by another state is entitled to the privileges and subject to the restrictions prescribed by this subchapter.

History. Acts 2009, No. 748, § 43; 2013, No. 1089, § 1.

Amendments. The 2013 amendment rewrote the section.

5-73-322. Concealed handguns in a university, college, or community college building.

(a) As used in this section:

(1)(A) "Public university, public college, or community college" means an institution that:

(i) Regularly receives budgetary support from the state government;

(ii) Is part of the University of Arkansas or Arkansas State University systems; or

(iii) Is required to report to the Arkansas Higher Education Coordinating Board.

(B) "Public university, public college, or community college" does not include a private university or private college solely because:

(i) Students attending the private university or private college receive state-supported scholarships; or

(ii) The private university or private college voluntarily reports to the Arkansas Higher Education Coordinating Board; and

(2) "Staff member" means a person who is not enrolled as a full-time student at the university, college, or community college and is either employed by the university, college, or community college full time or is on a nine-month or twelve-month appointment at the university, college, or community college as a faculty member.

(b) A licensee may possess a concealed handgun in the buildings and on the grounds, whether owned or leased by the public university, public college, or public community college, of the public university, public college, or public community college where he or she is employed unless otherwise prohibited by § 5-73-306 if:

(1) He or she is a staff member; and

(2)(A) The governing board of the public university, public college, or public community college does not adopt a policy expressly disallowing the carrying of a concealed handgun by staff members in the buildings or on the grounds of the public university, public college, or public community college and posts notices as described in § 5-73-306(19).

(B) A governing board of the public university, public college, or public community college may adopt differing policies for the carrying

of a concealed handgun by staff members for different campuses, areas of a campus, or individual buildings of the public university, public college, or public community college for which the governing board is responsible.

(C) A policy disallowing the carrying of a concealed handgun by staff members into the public university, public college, or public community college expires one (1) year after the date of adoption and must be readopted each year by the governing board of the public university, public college, or public community college to remain in effect.

(c) A licensee may possess a concealed handgun in the buildings and on the grounds of the private university or private college where he or she is employed unless otherwise prohibited by § 5-73-306 if:

(1) He or she is a staff member; and

(2) The private university or private college does not adopt a policy expressly disallowing the carrying of a concealed handgun in the buildings and on the grounds of the private university or private college and posts notices as described in § 5-73-306(19).

(d) The storage of a handgun in a university or college-operated student dormitory or residence hall is prohibited under § 5-73-119(c).

History. Acts 2013, No. 226, § 5.

5-73-323. Parole board exemptions.

A member of the Parole Board, a board investigator, or a parole revocation judge who has been issued a license to carry a concealed handgun by the Department of Arkansas State Police under this subchapter may carry his or her concealed handgun into a building in which or a location on which a law enforcement officer may carry a handgun if the board member, board investigator, or parole revocation judge is on official business of the board.

History. Acts 2013, No. 320, § 2.

Subchapter 4 — Concealed Handgun License Reciprocity

SECTION.
5-73-401. [Repealed.]
5-73-402. [Repealed.]

5-73-401. [Repealed.]

Publisher's Notes. This section, concerning handgun license reciprocity, was repealed by Acts 2007, No. 198, § 2, and No. 827, § 104.

For current law, see § 5-73-321.

5-73-402. [Repealed.]

Publisher's Notes. This section, concerning recognition of other states' permits, was repealed by Acts 2009, No. 748, § 44. The section was derived from Acts 1997, No. 1239, § 13; 2007, No. 198, § 3; 2007, No. 827, § 104.

For current law, see § 5-73-321.

CHAPTER 74

GANGS

SUBCHAPTER.

1. Arkansas Criminal Gang, Organization, or Enterprise Act.

Subchapter 1 — Arkansas Criminal Gang, Organization, or Enterprise Act

5-74-101. Title.

RESEARCH REFERENCES

ALR. Validity of Criminal State Racketeer Influenced and Corrupt Organizations Acts and Similar Acts Related to Gang Activity and the Like. 58 A.L.R.6th 385.

5-74-103. Definitions.

CASE NOTES

Crime of Violence.

Allowing defendant's release on a bedspace bond under § 16-90-122 was erroneous because the release of offenders was only allowed if they were nonviolent in nature; defendant pled guilty to two counts of unlawful discharge of a firearm from a vehicle, which was a crime of violence under this section. State v. Britt, 368 Ark. 273, 244 S.W.3d 665 (2006).

5-74-104. Engaging in a continuing criminal gang, organization, or enterprise.

(a)(1) A person commits the offense of engaging in a continuing criminal gang, organization, or enterprise in the first degree if he or she:

(A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and

(B) That offense is part of a continuing series of two (2) or more predicate criminal offenses that are undertaken by that person in concert with two (2) or more other persons with respect to whom that person occupies a position of organizer, a supervisory position, or any other position of management.

(2) A person who engages in a continuing criminal gang, organization, or enterprise in the first degree is guilty of a felony two (2) classifications higher than the classification of the highest underlying predicate offense referenced in subdivision (a)(1)(A) of this section.

(b)(1) A person commits the offense of engaging in a continuing criminal gang, organization, or enterprise in the second degree if he or she:

(A) Commits or attempts to commit or solicits to commit a felony predicate criminal offense; and

(B) That offense is part of a continuing series of two (2) or more predicate criminal offenses that are undertaken by that person in concert with two (2) or more other persons, but with respect to whom that person does not occupy the position of organizer, a supervisory position, or any other position of management.

(2) A person who engages in a continuing criminal gang, organization, or enterprise in the second degree is guilty of a felony one (1) classification higher than the classification of the highest underlying predicate offense referenced in subdivision (b)(1)(A) of this section.

(c) A person who engages in a continuing criminal gang, organization, or enterprise when the underlying predicate offense is a Class A felony or a Class Y felony is guilty of a Class Y felony.

(d) Any sentence of imprisonment imposed pursuant to this section is in addition to any sentence imposed for the violation of a predicate criminal offense.

History. Acts 1993, No. 1002, § 1.

Publisher's Notes. This section is being set out to reflect a correction in (c).

RESEARCH REFERENCES

ALR. Validity of Criminal State Racketeer Influenced and Corrupt Organizations Acts and Similar Acts Related to Gang Activity and the Like. 58 A.L.R.6th 385.

CASE NOTES

In Concert.

Defendant's conviction for first-degree continuing-criminal-enterprise in connection with the possession and uttering of counterfeit money was reversed and dismissed as defendant did not act in concert with two other individuals; evidence established that defendant had the first individual pass a counterfeit one-hundred-dollar bill at a store, but the first individual testified that defendant had assured her that the bill was real and, while the second individual was visiting defendant, defendant offered him a one-hundred-dollar bill in exchange for twenty dollars, but the second individual refused that offer. Taylor v. State, 94 Ark. App. 21, 223 S.W.3d 80 (2006).

5-74-106. Simultaneous possession of drugs and firearms.

(a) A person shall not unlawfully commit a felony violation of §§ 5-64-419 — 5-64-442 or unlawfully attempt, solicit, or conspire to

commit a felony violation of §§ 5-64-419 — § 5-64-442 while in possession of:

(1) A firearm; or

(2) Any implement or weapon that may be used to inflict serious physical injury or death, and that under the circumstances serves no apparent lawful purpose.

(b) Any person who violates this section is guilty of a Class Y felony.

(c) This section does not apply to a misdemeanor drug offense.

(d) It is a defense to this section that the defendant was in his or her home and the firearm or other implement or weapon was not readily accessible for use.

History. Acts 1993, No. 1002, § 1; 2007, No. 827, § 105; 2011, No. 570, § 70.

A.C.R.C. Notes. Acts 2011, No. 570, § 1, provided: "The intent of this act is to implement comprehensive measures designed to reduce recidivism, hold offenders accountable, and contain correction costs."

Amendments. The 2011 amendment, in the introductory language of (a), substituted "§ 5-64-419 — § 5-64-442" for "§ 5-64-401" and "§ 5-64-419 — § 5-64-442" for "§ 5-64-401."

CASE NOTES

Analysis

Elements of Offense.
Evidence.

Elements of Offense.

When defendant was convicted of simultaneously possessing drugs and firearms, in violation of subdivision (a)(1) of this section, defendant did not waive, for appellate review, the issue of whether sufficient evidence showed defendant possessed a firearm by not renewing a directed verdict motion at the close of all evidence because defendant moved for a directed verdict at the close of the state's evidence, and defendant did not present any evidence. Patton v. State, 2010 Ark. App. 453, — S.W.3d — (2010).

When defendant was convicted of simultaneously possessing drugs and firearms, in violation of subdivision (a)(1) of this section, sufficient evidence supported a jury's finding that defendant possessed a firearm because (1) defendant told police a gun found in defendant's wife's purse belonged to defendant, (2) defendant and defendant's wife were in defendant's car, in which the purse was found, together when police pulled up behind the car, and (3) defendant fled when police tried to arrest defendant, after finding a marijuana cigarette in the car. Patton v. State, 2010 Ark. App. 453, — S.W.3d — (2010).

Evidence.

Evidence of drugs and firearms, both found in defendant's locked bedroom, provided sufficient evidence for a conviction of simultaneous possession under subsection (a) of this section because defendant had the only key to the bedroom, which was deemed to give him constructive possession under § 5-64-401(c), and defendant did not qualify for the exemption under subsection (d) of this section because he was not home at the time of the search and the firearms were easily accessible. Ibarra v. State, 2009 Ark. App. 707, — S.W.3d — (2009).

Evidence was sufficient to convict defendant of drug possession charges given that a crack house was rented to him, a confidential informant testified that he purchased drugs from defendant a day earlier, the serial numbers of money found on defendant matched the money used in the controlled buy, and drugs were in plain view in the home. Carter v. State, 2010 Ark. 293, — S.W.3d — (2010), appeal dismissed, 2011 Ark. 226, — S.W.3d — (2011).

In a case in which defendant appealed his convictions for simultaneously violating subdivision (a)(1) of this section, §§ 5-64-401(b)(1), and 5-64-403(c)(1)(A)(i), he argued unsuccessfully that the evidence was insufficient to establish possession.

There was substantial evidence that he exercised care, control, and management over the contraband; (1) he lived at the house where the contraband was discovered, (2) a police officer found several illegal items lying in close proximity to defendant, and (3) there was no evidence that there were other suspects in the home at the time of the raid that may have also lived there. Allen v. State, 2010 Ark. App. 266, — S.W.3d — (2010).

Defendant's conviction for simultaneous possession of drugs and firearms was proper because the evidence to support the conviction was overwhelming and confirmed by testimony of a woman who was living with defendant in the motel room where the evidence was found; inside the motel room, investigators discovered defendant's personal identification and other personal paperwork, substantial amounts of marijuana and other drugs, two firearms, drug paraphernalia, and a ledger of drug transactions. Mathis v. State, 2010 Ark. App. 665, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 810 (Nov. 10, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 616 (Dec. 2, 2010).

Evidence was sufficient to convict defendant of simultaneous possession of drugs and firearms under subdivision (a)(1) of this section and defendant could not avail himself of the defense in subsection (d) as he possessed methamphetamine and a gun was accessible for use because it was in plain sight on a night stand with an ammunition clip nearby and the gun could have easily been loaded. Arroyo v. State, 2011 Ark. App. 523, — S.W.3d — (2011).

Evidence was sufficient to convict defendant of possession of cocaine and simultaneous possession of drugs and firearms, because the jury could reasonably conclude that defendant had knowledge of the cocaine and exercised care, control, and management of the cocaine, and defendant constructively possessed the cocaine and he did so while in possession of a firearm; the cocaine was found at a location that was level with the driver's knee and defendant was in close proximity to the drugs, and the handgun was located inside the vehicle. Boykin v. State, 2012 Ark. App. 274, — S.W.3d — (2012).

5-74-107. Unlawful discharge of a firearm from a vehicle.

CASE NOTES

Analysis

Crime of Violence.
Evidence Sufficient.

Crime of Violence.

Allowing defendant's release on a bedspace bond under § 16-90-122 was erroneous because the release of offenders was only allowed if they were nonviolent in nature; defendant pled guilty to two counts of unlawful discharge of a firearm from a vehicle, which was a crime of violence under § 5-74-103. State v. Britt, 368 Ark. 273, 244 S.W.3d 665 (2006).

Evidence Sufficient.

Evidence supported defendant's convictions for second-degree unlawful discharge of a firearm from a vehicle under subdivision (b)(1) of this section because (1) an employee at a fast food restaurant that was located in a gas station testified that she saw defendant shooting toward the gas station; (2) a gas station employee and a third witness testified that they witnessed gunfire from a black vehicle toward the gas station; (3) while the gas station employee and the third witness did not actually see defendant shooting the gun from the black vehicle, there was substantial evidence that defendant was the only person in the vehicle at the time of the shooting; (4) not one witness at the gas station testified that they saw another individual in the vehicle; (5) the third witness pursued defendant from the gas station until just a couple of minutes before he was arrested; and (6) when defendant was arrested, the vehicle was searched, no other individual was found, and a gun casing (that matched the gun that defendant threw out of the window of his vehicle after the shooting) fell out of his lap. McBride v. State, 99 Ark. App. 146, 257 S.W.3d 914 (2007).

At trial for capital murder and unlawful discharge of a firearm from a vehicle, witnesses' in-court identifications of de-

fendant were not so unreliable that his conviction should be overturned because: (1) the jury clearly found the witnesses and their identifications of defendant credible; (2) defendant did not challenge or object to the witnesses' in-court identifications when they were made, but instead attempted to discredit their testimony on cross-examination; and (3) he merely challenged the in-court identifications in the context of his challenge to the sufficiency of the evidence. Davenport v. State, 373 Ark. 71, 281 S.W.3d 268 (2008).

Substantial evidence supported defendant's convictions for aggravated robbery, kidnapping, aggravated assault, theft of property, unlawful discharge of a firearm from a vehicle, and fleeing because while the state did not prove that defendant actually entered a bank, it did provide substantial evidence that he was the driver of the getaway car and thus was an accomplice of the two men who committed the aggravated robbery, kidnapping, and theft of property; while defendant did not personally shoot at an officer's vehicle, his conduct of driving the fleeing vehicle while another person in the car fired the shots sufficiently implicated him as an accomplice to unlawfully discharging a firearm from a vehicle. Barber v. State, 2010 Ark. App. 210, 374 S.W.3d 709 (2010).

5-74-108. Engaging in violent criminal group activity.

RESEARCH REFERENCES

ALR. Validity of Criminal State Racketeer Influenced and Corrupt Organizations Acts and Similar Acts Related to Gang Activity and the Like. 58 A.L.R.6th 385.

CASE NOTES

Analysis

Evidence.
Sufficiency of Evidence.

Evidence.

Trial court did not err in admitting photographs from defendant's Facebook page to show that she was engaging in violent, criminal group activity by violating Arkansas law while acting in concert with two or more persons in violation of this section. Williamson v. State, 2011 Ark. App. 73, 381 S.W.3d 134 (2011).

Sufficiency of Evidence.

Defendants' sentences were improperly enhanced under this section for committing assault "in concert" with two or more other persons because, even assuming that the evidence was sufficient to support a finding that three people were involved in a melee directed at the victim, the evidence was insufficient to show that any third person acted "in concert" with the two defendants. Evidence of mutual agreement in a common plan or enterprise was lacking. Johnson v. State, 2010 Ark. App. 252, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 288 (May 20, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 290 (May 20, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 293 (May 20, 2010).

5-74-109. Premises and real property used by criminal gangs, organizations, or enterprises, or used by anyone in committing a continuing series of violations — Civil remedies.

CASE NOTES

Nuisance Not Found.

Strip mall store was not a common nuisance under subsection (b) of this section because the circuit court's finding of no facilitation or linkage was not clearly against the preponderance of the evidence, when the police detective testified that the store had not been involved either directly or indirectly with any of the shootings, and the evidence showed the store had taken extensive measures to curb the criminal activity at or near the strip mall property, including hiring security guards, installing flood lights and surveillance cameras, and building a fence to keep loiterers from going behind the building. City of Little Rock v. Jung Yul Rhee, 375 Ark. 491, 292 S.W.3d 292 (2009).

CHAPTER 75

OPERATION OF AIRCRAFT WHILE INTOXICATED

5-75-103. Implied consent.

(a) Any person who operates or navigates any aircraft or is in actual physical control of any aircraft in this state is deemed to have given consent, subject to the provisions of § 5-75-104, to a chemical test of his or her blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of his or her breath or blood, if:

(1) The operator or navigator is arrested for any offense arising out of an act alleged to have been committed while the person was operating or navigating any aircraft while intoxicated or operating or navigating any aircraft while there was an alcohol concentration of four-hundredths (0.04) or more in the person's breath or blood;

(2) The person is involved in an accident while operating, navigating, or in actual physical control of any aircraft; or

(3) The person is stopped by a law enforcement officer who has reasonable cause to believe that the person, while operating, navigating, or in actual physical control of any aircraft, is intoxicated or has an alcohol concentration of four-hundredths (0.04) or more in his or her breath or blood.

(b) Any person who is dead, unconscious, or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn the consent provided by subsection (a) of this section, and a chemical test may be administered subject to the provisions of § 5-75-104.

History. Acts 1993, No. 824, § 3; 2001, No. 561, § 18; 2013, No. 361, § 15.
Amendments. The 2013 amendment, in (a), inserted "saliva" and "concentration."

5-75-104. Administration.

(a) A chemical test shall be administered at the direction of a law enforcement officer having reasonable cause to believe the person to have been operating, navigating, or in actual physical control of any aircraft while:

(1) Intoxicated; or

(2) There was an alcohol concentration of four-hundredths (0.04) or more in the person's breath or blood.

(b)(1) The law enforcement agency by which that law enforcement officer is employed shall designate which chemical test shall be administered, and the law enforcement agency is responsible for paying any expense incurred in conducting a chemical test.

(2) If the person tested requests that an additional chemical test be made, as authorized in § 5-75-105, the cost of the additional chemical test shall be borne by the person tested.

(3) If any person shall object to the taking of his or her blood for a chemical test, as authorized in this section, the breath, saliva, or urine of the person may be used for the chemical test.

History. Acts 1993, No. 824, § 4; 2001, No. 561, § 19; 2013, No. 361, § 16.
Amendments. The 2013 amendment, in (b)(3), inserted "saliva" and substituted "for the chemical test" for "to make the analysis."

5-75-106. Criminal prosecution — Evidence.

(a) In any criminal prosecution of a person charged with the offense of operating or navigating any aircraft while intoxicated, the amount of alcohol in the defendant's breath or blood at the time or within two (2) hours of the alleged offense, as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance gives rise to the following:

(1) If there was at that time an alcohol concentration less than four hundredths (0.04) in the defendant's blood, urine, breath, or other bodily substance, it is presumed that the defendant was not under the influence of intoxicating liquor; and

(2) If there was at the time an alcohol concentration of four hundredths (0.04) or more in the defendant's blood, urine, breath, or other bodily substance, this fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(b) Subsection (a) shall not be construed as limiting the introduction of any other relevant evidence bearing upon the question of whether or not the defendant was intoxicated.

(c) The chemical analysis referred to in this section shall be made by a method approved by the State Board of Health.

(d)(1)(A) A record or report of a certification, rule, evidence, analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Department of Health under the authority of this chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure, when duly attested to by the Director of the Office of Alcohol Testing of the Department of Health or an assistant, in the form of an original signature or by certification of a copy.

(B) A document described in subdivision (d)(1)(A) of this section is self-authenticating.

(2) However, the instrument performing the chemical analysis shall have been duly certified at least one (1) time in the last three (3) months preceding arrest, and the operator of the instrument shall have been properly trained and certified.

(3) Nothing in this section is deemed to abrogate a defendant's right of cross-examination of the person who performs the calibration test or check on the instrument, the operator of the instrument, or a representative of the office.

(4) The testimony of the appropriate analyst or official may be compelled by the issuance of a proper subpoena ten (10) days prior to the date of the hearing or trial, in which case, the record or report is admissible through the analyst or official, who is subject to cross-examination by the defendant or his or her counsel.

History. Acts 1993, No. 824, § 6; 2001, No. 561, §§ 21, 22; 2007, No. 827, § 106.

CHAPTER 76

OPERATION OF MOTORBOATS WHILE INTOXICATED

5-76-101. Definitions.

As used in this chapter:

(1) "Controlled substance" means a drug, substance, or immediate precursor in Schedules I-VI of the Uniform Controlled Substances Act, § 5-64-101 et seq.;

(2) "Intoxicated" means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination of alcohol, a controlled substance, or intoxicant, to such a degree that the operator's reactions, motor skills, and judgment are substantially altered and the operator constitutes a clear and substantial danger of physical injury or death to himself, herself, or others;

(3)(A) "Motorboat" means any vessel operated upon water and that is propelled by machinery, whether or not the machinery is the principal source of propulsion.

(B) "Motorboat" includes personal watercraft as defined in § 27-101-103(10);

(4) "Operator" means a person who is controlling the speed and direction of a motorboat or a person who is in direct physical control of the motorboat;

(5) "Underage" means any person who is under twenty-one (21) years of age and may not legally consume alcoholic beverages in Arkansas; and

(6) "Waters" means any public waters within the territorial limits of the State of Arkansas.

History. Acts 1995, No. 518, § 1; 2005, No. 1458, § 1; 2009, No. 693, § 1.

Amendments. The 2009 amendment, in (3), inserted (3)(B), redesignated the remaining text accordingly, and made a related change.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

5-76-102. Unlawful acts.

(a) No person shall operate any motorboat on the waters of this state while:

(1) Intoxicated; or

(2) There is an alcohol concentration in the person's breath or blood of eight hundredths (0.08) or more based upon the definition of breath, blood, and urine concentration in § 5-65-204.

(b)(1) In the case of a motorboat or device, only if the certified law enforcement officer has probable cause to believe that the operator of the motorboat is operating while intoxicated or operating while there is an alcohol concentration of eight hundredths (0.08) in the person's breath or blood, the certified law enforcement officer may administer and may test the operator at the scene by using a portable breathtesting instrument or other approved method to determine if the operator may be operating a motorboat or device in violation of this section.

(2) The consumption of alcohol or the possession of an open container aboard a vessel does not in and of itself constitute probable cause.

(c)(1)(A) For a first offense, a person violating this section shall be punished by imprisonment in the county or municipal jail for not more than one (1) year or by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000) or by both fine and imprisonment.

(B) In addition, the court shall order the person not to operate a motorboat for a period of ninety (90) days.

(2)(A)(i) For a second offense within a three-year period, a person violating this section shall be punished by a fine of not less than five

hundred dollars ($500) nor more than two thousand five hundred dollars ($2,500) and by imprisonment in the county or municipal jail for not more than one (1) year.

(ii) The sentence shall include a mandatory sentence that is not subject to suspension or probation of imprisonment in the county or municipal jail for not less than forty-eight (48) consecutive hours or community service for not less than twenty (20) days.

(B) In addition, the court shall order the person not to operate a motorboat for a period of one (1) year.

(3)(A) For a third or subsequent offense within a three-year period, a person violating this section shall be punished by a fine of not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000) and by imprisonment in the county or municipal jail for not less than sixty (60) days nor more than one (1) year, to include a minimum of sixty (60) days which shall be served in the county or municipal jail and that shall not be probated or suspended.

(B) In addition, the court shall order the person not to operate a motorboat for a period of three (3) years.

(4) Any person who operates a motorboat on the waters of this state in violation of a court order issued pursuant to this section shall be imprisoned for ten (10) days.

(d) A person who has been arrested for violating this section shall not be released from jail, under bond or otherwise, until the alcohol concentration is less than eight hundredths (0.08) in the person's breath or blood and the person is no longer intoxicated.

(e)(1) In any criminal prosecution of a person charged with violating subsection (a) of this section, the amount of alcohol in the defendant's blood at the time of or within four (4) hours of the alleged offense, as shown by chemical analysis of the defendant's blood, urine, breath, or other bodily substance, gives rise to the following:

(A) If there was at that time an alcohol concentration of four hundredths (0.04) or less in the defendant's blood, urine, breath, or other bodily substance, it is presumed that the defendant was not under the influence of intoxicating liquor; and

(B) If there was at that time an alcohol concentration in excess of four hundredths (0.04) but less than eight hundredths (0.08) in the defendant's blood, urine, breath, or other bodily substance, this fact does not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(2) The provisions of subdivision (e)(1) of this section shall not be construed as limiting the introduction of any other relevant evidence bearing upon the question of whether or not the defendant was intoxicated.

(3)(A) A record or report of a certification, rule, evidence analysis, or other document pertaining to work performed by the Office of Alcohol Testing of the Department of Health under the authority of this

chapter shall be received as competent evidence as to the matters contained in the record or report in a court of this state, subject to the applicable rules of criminal procedure, when duly attested to by the Director of the Department of Health or his or her assistant, in the form of an original signature or by certification of a copy.

(B) A document described in subdivision (e)(3)(A) of this section is self-authenticating.

(f) The fact that any person charged with violating subsection (a) of this section is or has been legally entitled to use alcohol or a controlled substance does not constitute a defense against any charge of violating subsection (a) of this section.

(g) Any fine for a violation of this chapter shall be remitted to the issuing law enforcement office to be used by the law enforcement office for the administration and enforcement of this chapter.

(h) Neither reckless operation of a motorboat nor any other boating or water safety infraction is a lesser included offense under a charge in violation of this section.

History. Acts 1995, No. 518, §§ 2-4, 6, 11, 12, 14; 2001, No. 561, §§ 25-27; 2005, No. 1461, § 1; 2007, No. 827, §§ 107, 108, 109.

5-76-103. Penalties.

(a) In addition to any other penalty provided in § 5-76-102, any person who pleads guilty or nolo contendere to or who is found guilty of violating § 5-76-102 is required to complete an alcohol education program as prescribed and approved by the Arkansas Highway Safety Program or an alcoholism treatment program as approved by the Division of Behavioral Health Services.

(b) The alcohol education program may collect a program fee of up to fifty dollars ($50.00) per enrollee to offset program costs.

(c)(1) A person ordered to complete an alcoholism treatment program under this section may be required to pay, in addition to the costs collected for treatment, a fee of up to twenty-five dollars ($25.00) to offset the additional costs associated with reporting requirements under this chapter.

(2) The alcohol education program shall report semiannually to the Arkansas Highway Safety Program all revenue derived from this fee.

(d)(1) Within ten (10) days after the conviction or forfeiture of bail of a person upon a charge of violating any provision of this subchapter, every magistrate or judge of a court not of record or clerk of the court of record in which the conviction was had or bail was forfeited shall prepare and forward to the Office of Driver Services an abstract of the record of the court covering the case in which the person was convicted or forfeited bail for the purpose of determining the number of previous offenses under § 5-65-104(a)(4).

(2) The abstract described in subdivision (d)(1) of this section shall be certified to be true and correct by the magistrate, judge, or clerk of the court required to prepare it.

History. Acts 1995, No. 518, § 5; 1997, No. 788, § 2; 1997, No. 1341, § 2; 2007, No. 1196, § 2; 2013, No. 1107, § 9.

Amendments. The 2013 amendment substituted "Division of Behavioral Health Services" for "Office of Alcohol and Drug Abuse Prevention" in (a).

5-76-104. Implied consent.

(a)(1) Any person who operates a motorboat or is in actual physical control of a motorboat in this state is deemed to have given consent, subject to the provisions of subsection (c) of this section, to a chemical test of his or her blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of his or her breath or blood if:

(A) The person is arrested for any offense arising out of an act alleged to have been committed while the person was operating a motorboat while intoxicated or operating a motorboat while there was an alcohol concentration of at least eight-hundredths (0.08) in the person's breath or blood;

(B) The person is involved in an accident while operating a motorboat; or

(C) At the time the person is arrested for operating a motorboat while intoxicated, the law enforcement officer has reasonable cause to believe that the person, while operating a motorboat, is intoxicated or has an alcohol concentration of eight-hundredths (0.08) or more in his or her breath or blood.

(2) Any person who is dead, unconscious, or otherwise in a condition rendering the person incapable of refusal, is deemed not to have withdrawn the consent provided by subdivision (a)(1) of this section, and a chemical test may be administered subject to the provisions of subsection (c) of this section.

(3)(A) When a person operating a motorboat is involved in an accident resulting in loss of human life or when there is reason to believe that death may result, a law enforcement officer shall request and the person shall submit to a chemical test of the person's blood, breath, saliva, or urine for the purpose of determining the alcohol concentration or controlled substance content of his or her breath or blood.

(B) The law enforcement officer shall cause the chemical test to be administered to the person, including a person fatally injured.

(b)(1) If a court determines that a law enforcement officer had reasonable cause to believe an arrested person had been operating a motorboat in violation of § 5-76-102(a) and the person refused to submit to a chemical test upon request of the law enforcement officer, the court shall levy a fine of not less than one thousand dollars ($1,000) and not to exceed two thousand five hundred dollars ($2,500) and suspend the operating privileges of the person for a period of six (6) months, in addition to any other suspension imposed for violating § 5-76-102(a).

(2) If a person operating a motorboat is involved in an accident resulting in loss of human life and the person refuses to submit to a

chemical test upon the request of the law enforcement officer, the court shall levy a fine of not less than two thousand five hundred dollars ($2,500) and not to exceed five thousand dollars ($5,000) and suspend the operating privileges of the person for a period of two (2) years, in addition to any other suspension imposed for violating § 5-76-102(a).

(c)(1) A chemical test shall be administered at the direction of a law enforcement officer having reasonable cause to believe the person to have been operating a motorboat while intoxicated or while there is an alcohol concentration of eight-hundredths (0.08) or more in the person's breath or blood.

(2)(A) The law enforcement agency employing the law enforcement officer shall designate which chemical test is administered, and the law enforcement agency is responsible for paying any expense incurred in conducting the chemical test.

(B) If a person tested requests that an additional chemical test be made, as authorized in subsection (g) of this section, the cost of the additional chemical test shall be borne by the person tested.

(3) If any person objects to the taking of his or her blood for a chemical test, as authorized in this section, the breath or urine of the person may be used to make the chemical analysis.

(d)(1) To be considered valid under the provisions of this chapter, a chemical analysis of a person's blood, urine, or breath shall be performed according to a method approved by the State Board of Health or by an individual possessing a valid permit issued by the Department of Health for that purpose.

(2) The department may:

(A) Approve a satisfactory technique or method for the chemical analysis;

(B) Ascertain the qualifications and competence of an individual to conduct the chemical analysis; and

(C) Issue a permit to conduct the chemical analysis that is subject to termination or revocation at the discretion of the division.

(e)(1) When a person submits to a blood test at the request of a law enforcement officer, blood may be drawn by a physician or by a person acting under the direction and supervision of a physician.

(2) The limitation provided in subdivision (e)(1) of this section does not apply to the taking of a breath or urine specimen.

(3)(A) No person, institution, or office in this state that withdraws blood for the purpose of determining alcohol or controlled substance content of the blood at the request of a law enforcement officer under a provision of this chapter shall be held liable for violating any criminal law of this state in connection with the withdrawing of the blood.

(B) No physician, institution, or person acting under the direction or supervision of a physician shall be held liable in tort for the withdrawal of the blood unless the person is negligent in connection with the withdrawal of the blood or the blood is taken over the objections of the subject.

(f) Upon the request of a person who submits to a chemical test at the request of a law enforcement officer, full information concerning the chemical test shall be made available to the person or his or her attorney.

(g)(1) A person tested may have a physician, qualified technician, registered nurse, or other qualified person of his or her own choice administer a complete chemical test in addition to any chemical test administered at the direction of a law enforcement officer.

(2) The law enforcement officer shall advise the person of the right provided in subdivision (g)(1) of this section.

(3) The refusal or failure of a law enforcement officer to advise the person of the right provided in subdivision (g)(1) of this section and to permit and assist the person to obtain the chemical test precludes the admission of evidence relating to a chemical test taken at the direction of a law enforcement officer.

History. Acts 1995, No. 518, §§ 7-10; 1997, No. 823, § 1; 2001, No. 561, §§ 28, 29; 2013, No. 361, §§ 17, 18.

Amendments. The 2013 amendment, in (a)(1) and (a)(3)(A), inserted "saliva" and "concentration."

5-76-107. Unlawful acts by underage operator.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

5-76-108. Fines for violating § 5-76-107.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2005 Arkansas General Assembly, Criminal Law, 28 U. Ark. Little Rock L. Rev. 335.

CHAPTER 77

OFFICIAL INSIGNIA

SUBCHAPTER.

2. Emergency Lights and Law Enforcement Insignia Sales.
3. Blue Light Sales.

Subchapter 2 — Emergency Lights and Law Enforcement Insignia Sales

SECTION.

5-77-201. Blue light or blue lens cap sales.
5-77-204. Emergency lights and sirens — Prohibited persons.
5-77-205. Resale of law enforcement vehicles.

5-77-201. Blue light or blue lens cap sales.

(a)(1) It is unlawful to sell or transfer a blue light or blue lens cap to any person other than a law enforcement officer or a county coroner.

(2) It is unlawful for a person other than a law enforcement officer or a county coroner to buy a blue light or blue lens cap.

(b) Before selling a blue light or blue lens cap, the seller shall require the buyer to provide identification that legally demonstrates that the buyer is a law enforcement officer or a county coroner.

(c) Any sale of a blue light or blue lens cap shall be reported to the Department of Arkansas State Police on a form prescribed by the department.

(d) Upon conviction, a person who violates this section is guilty of a Class D felony.

(e) As used in this section:

(1) "Blue lens cap" means a lens cap designed to produce a blue color of light when light from a device designed for an emergency vehicle passes through the lens cap; and

(2) "Blue light" means any operable device that:

(A) Emits a blue color of light;

(B) Is designed for use by an emergency vehicle or is similar in appearance to a device designed for use by an emergency vehicle; and

(C) Can be operated by use of the vehicle's battery, the vehicle's electrical system, or a dry cell battery.

History. Acts 1997, No. 1281, § 1; 2007, No. 827, § 110.

5-77-204. Emergency lights and sirens — Prohibited persons.

(a) It is unlawful for a person who has pleaded guilty or nolo contendere to or has been found guilty of a felony or domestic battering in the third degree, § 5-26-305, or a person required to register as a sex offender under the Sex Offender Registration Act of 1997, § 12-12-901 et seq., to knowingly:

(1) Purchase or possess an emergency vehicle light or siren with a purpose to install or use the emergency vehicle light or siren on a motor vehicle that reasonably appears to be or that mimics a law enforcement vehicle;

(2) Install or use an emergency vehicle light or siren on a motor vehicle that reasonably appears to be or that mimics a law enforcement vehicle; or

(3) Operate a motor vehicle that reasonably appears to be or that mimics a law enforcement vehicle and the motor vehicle has an emergency vehicle light or siren installed on the motor vehicle or in use on the motor vehicle.

(b) It is a defense to prosecution under this section that the person was a certified law enforcement officer acting within the scope of his or her duty.

(c) As used in this section:

(1) "Emergency vehicle light" means a device that emits a light of any color and that is:

(A) Designed for use by an emergency vehicle; or

(B) Similar in appearance to a device designed for use by an emergency vehicle;

(2) "Law enforcement vehicle" means any vehicle owned or operated by a law enforcement agency; and

(3) "Siren" means an acoustic or electronic device producing a loud or wailing sound as a signal or warning.

(d) A violation of this section is a Class A misdemeanor.

History. Acts 2009, No. 561, § 1.

5-77-205. Resale of law enforcement vehicles.

(a) Except as provided in subsection (b) of this section, before a law enforcement vehicle is offered for sale to the public, the seller of the law enforcement vehicle shall remove from the law enforcement vehicle the:

(1) Lightbar;

(2) Spotlight;

(3) Siren;

(4) Law enforcement decals and signage;

(5) Radios; and

(6) Other items associated solely with law enforcement vehicles.

(b) The items required to be removed under subdivisions (a)(1)–(6) of this section are not required to be removed if the law enforcement vehicle is sold to a law enforcement agency.

(c) A violation of subsection (a) of this section is a violation and punishable by a fine of not more than one thousand dollars ($1,000).

History. Acts 2009, No. 792, § 1.

Subchapter 3 — Blue Light Sales

SECTION.

5-77-301. [Repealed.]

Publisher's Notes. This subchapter, concerning blue light sales, was repealed by Acts 2007, No. 827, § 111. The subchapter was derived from the following source:

5-77-301. Acts 1997, No. 497, § 2. For current law, see § 5-77-201.

CHAPTER 78

TOBACCO

SECTION.

5-78-102. Possession of cigarette or tobacco product by minor — Confiscation — Additional punishment.

(a) A cigarette or tobacco product found in the possession of a person under eighteen (18) years of age may be confiscated by a certified law enforcement officer or a school official and immediately destroyed.

(b) If a minor who is found by a court to be in violation of any criminal statute is also found to have been in possession of a cigarette or tobacco product at the time of the violation of the criminal statute, the court may order the minor to perform up to three (3) hours of community service and to enroll in a tobacco education program, in addition to any other punishment imposed by the court for the violation of the criminal statute.

(c)(1) Any additional punishment ordered by the court under subsection (b) of this section is not a criminal offense and shall not be recorded as a criminal offense in the records of this state.

(2) All records of a proceeding under this section shall be permanently expunged from any record created or maintained by any agency, department, county, or municipality.

History. Acts 1999, No. 1331, § 2; 2011, No. 868, § 2; 2013, No. 1125, § 20.

A.C.R.C. Notes. Acts 2011, No. 868, § 1, provided: "Legislative findings.

"(a) It is the public policy of this state to prohibit the sale of tobacco products to persons younger than eighteen (18) years of age and prohibit the use of tobacco by persons younger than eighteen (18) years of age.

"(b) Studies show that ninety percent (90%) of adult smokers began when they were in their teens, or earlier, and two-thirds (⅔) become regular, daily smokers before they reach nineteen (19) years of age.

"(c) Even though Arkansas retailers have a strict policy of not selling tobacco products to minors, a sizable percentage of minors do obtain and use tobacco products.

"(d) Although the use of tobacco products by minors is an unlawful act, it is only a violation and should not be treated as a criminal offense.

"(e) A stronger deterrent is needed to discourage the illegal use of tobacco products by minors."

Amendments. The 2011 amendment added (b) and (c).

The 2013 amendment, in (b), inserted "criminal," "at the time of the violation of the criminal statute" and "for the violation of the criminal statute" and substituted "have been" for "be."

CHAPTER 79
BODY ARMOR

SECTION.

5-79-101. Criminal possession of body armor.

(a) A person commits criminal possession of body armor if the person knowingly possesses body armor and he or she:

(1) Has been found guilty of or has pleaded guilty or nolo contendere to any of the following offenses:

(A) Capital murder, § 5-10-101;

(B) Murder in the first degree, § 5-10-102;

(C) Murder in the second degree, § 5-10-103;

(D) Manslaughter, § 5-10-104;

(E) Aggravated robbery, § 5-12-103;

(F) Battery in the first degree, § 5-13-201;

(G) Aggravated assault, § 5-13-204; or

(H) A felony violation of § 5-64-401 et seq.; or

(2) Is committing or attempts to commit:

(A) A felony involving violence as defined in § 5-4-501(d)(2);

(B) Capital murder, § 5-10-101, manslaughter, § 5-10-104, or negligent homicide, § 5-10-105;

(C) False imprisonment in the first degree, § 5-11-103, false imprisonment in the second degree, § 5-11-104, vehicular piracy, § 5-11-105, or permanent detention or restraint, § 5-11-106;

(D) Robbery, § 5-12-102;

(E) Battery in the second degree, § 5-13-202; or

(F) Trafficking of persons, § 5-18-103.

(b) As used in this section, "body armor" means any material designed to be worn on the body and to provide bullet penetration resistance.

(c) Criminal possession of body armor is a Class D felony.

History. Acts 1999, No. 1449, § 1; 2005, No. 1994, § 299; 2013, No. 542, § 1.

Amendments. The 2013 amendment rewrote (a) and (c).

RESEARCH REFERENCES

ALR. Validity, Construction, and Application of State Statutes Criminalizing Possession of Body Armor by Felon Convicted of Violent Crime. 31 A.L.R.6th 615.

Validity, Construction, and Application of 18 USCS § 931 Criminalizing Possession of Body Armor by Felon Convicted of Violent Crime. 21 ALR Fed. 2d 361.